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*Farrand's Premium Edition.*

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THE  
PRACTICE  
OF THE  
COURT OF KING'S BENCH  
IN PERSONAL ACTIONS:  
WITH  
REFERENCES TO CASES OF PRACTICE  
IN THE  
COURT OF COMMON PLEAS.  
IN TWO VOLUMES.  
VOL. II.

FIRST AMERICAN,  
FROM THE CORRECTED AND ENLARGED LONDON EDITION.

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BY WILLIAM TIDD, Esq.  
OF THE INNER TEMPLE.

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## CHAPTER XXXI.

*Of MAKING UP, and ENTERING the ISSUE.*

**A**N *issue* is defined to be a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff and defendant <sup>a</sup>; but it more commonly signifies, the entry of the allegations or pleadings themselves: And it is either in *law*, upon a demurrer, or in *fact*, which is triable by the court, upon *nul tiel record*, or by a jury, upon pleadings concluding to the country.

An issue in fact triable by a jury, is either such as arises in the course of an adverse suit, or is directed by some court of law or equity, or framed under the authority of an act of parliament, for the trial of a disputed question; which latter is called a *feigned issue* <sup>b</sup>. Two or more issues are sometimes joined in the same cause; as where the defendant demurs and pleads to different counts of a declaration, or the plaintiff demurs and replies to different pleas, or where, in an action against two or more defendants, they appear by different attornies, and sever in pleading.

The

<sup>a</sup> Co. Lit. 126. a.

<sup>b</sup> Append. Chap. XXXI. § 37.

The issue, as dependent on the pleadings, is *general* or *special*. In every action, wherein the defendant pleads the general issue, or demurs generally to the declaration; on a plea of *plene administravit* by an executor or administrator; in *debt*, where the defendant pleads a special *non est factum*, *comperuit ad diem* to a bail-bond, or *nul tiel record* to an action on a judgment or recognisance; in *covenant*, where his plea concludes to the country; and in *trespass*, where he pleads *son assault demesne*, *liberum tenementum*, or not guilty to a new assignment; the issue is made up, on treble-penny stamped paper, by the attornies; who likewise make up all issues and demurrers upon writs of error, *scire facias*, and *audita querela*, and repleaders, or other matters formerly entered of record <sup>c</sup>. In all other cases, both by bill and original, the issue, or as it is commonly termed, the *paper-book*, or upon an issue in law, the *demurrer-book*, is made up by the clerk of the papers <sup>d</sup>; who charges the plaintiff's attorney *eight pence per sheet* for the whole book, and *four pence per sheet* for all the pleadings subsequent to the declaration, (which the plaintiff's attorney furnishes him with a copy of,) besides stamps.

Formerly,

<sup>c</sup> R. T. 12 W. III. a.    <sup>d</sup> Say. Rep. 97. but see 2 Str. 1266.

Formerly, when the plaintiff in his replication concluded to the country, or demurred, the issue could not have been made up, till a four-day rule had been given and expired, to rejoin, or join in demurrer; but the practice in that respect is now altered, it being a rule, that in all special pleadings, where the plaintiff takes issue upon the defendant's pleading, or traverses the same, or demurs, so as the defendant is not let in to allege any new matter, the plaintiff may make up the paper-book, without giving a rule to rejoin<sup>e</sup>: but otherwise a rule must be given for that purpose, unless the defendant be bound, by a judge's order, to rejoin *gratis*.

The issue contains an entry or transcript of the declaration, and other subsequent pleadings<sup>f</sup>; and in actions by *bill*, should be made up of the term in which it is joined<sup>g</sup>: And it is prefaced with a *memorandum*, stating the exhibiting of the bill, and that there are pledges for the prosecution of it<sup>h</sup>. The reason for a *memorandum* is, that proceedings by *bill* were formerly considered as the bye-business of the court<sup>i</sup>: And it varies in four cases; first, when the issue is of the same term in which the cause of action accrued; secondly, when it is of a term subsequent to the cause

<sup>e</sup> R. T. 1 G. II. a.

<sup>h</sup> Append. Chap. XXXI. §

<sup>f</sup> Append. Chap. XXXI. § 1, &c.

1, &c.

<sup>i</sup> Gilb. C.P. 47.

<sup>g</sup> 3 East, 204.



cause of action, but of the same term with the declaration; thirdly, when it is of a term subsequent to the declaration, and within four terms after; fourthly, when it is more than four terms after the declaration. In the first case, the *memorandum* is special, stating the bill to have been exhibited on a particular day in term, after the cause of action accrued: In the second case, it states the bill to have been exhibited on the first day of the term in which the declaration was delivered: In the third and fourth cases, it pursues the fact, but with this difference, that in the third case, the term of exhibiting the bill is referred to as *last* past, and in the fourth, as in a certain year of the king's reign.

The *bill* or declaration then follows; and afterwards, if the plea be of a term subsequent to the declaration, the issue by bill contains the entry of an imparlance<sup>j</sup>; which, we have seen, is general or special. Where a special imparlance is necessary, to enable the defendant to plead any particular plea, it must be entered in the issue; but otherwise the entry of a general imparlance is sufficient: And it is not necessary to enter more than one imparlance, though several terms have intervened between the declaration and the plea<sup>k</sup>. When the replication is of a term subsequent to the plea, it is usual for the clerk of the  
papers

<sup>j</sup> Append. Chap. XXXI. § 2.      <sup>k</sup> *Id. ibid.*



papers to insert continuances in the paper-book; but this does not seem to be necessary <sup>1</sup>.

The *pleadings* are next copied, in their proper order, beginning each with a new line; and under them, the clerk of the papers is directed to write the names of the counsel by whom they are signed, as well on the part of the plaintiff, as of the defendant <sup>m</sup>. Formerly, if there had been a plea in abatement, upon which a *respondeas ouster* was awarded, and afterwards the defendant had pleaded in chief, it was necessary to enter the plea in abatement, and judgment of *respondeas ouster*, in making up the issue, as well as the plea in chief <sup>n</sup>; and where they were entered in the plea-roll, but omitted in the record of *Nisi Prius*, the court on that ground arrested the judgment, the record of *Nisi Prius* not appearing to be in the same cause <sup>o</sup>. Afterwards a rule was made, that for the future, a copy of the plea in chief only should be delivered and paid for <sup>p</sup>; and agreeably thereto, where the plea in abatement, and judgment of *respondeas ouster*, were omitted in the plea-roll, the court held the omission to be immaterial; particularly, as the defendant had accepted and paid for the issue <sup>q</sup>.

An issue in fact by *bill*, when triable by the country, concludes with the award of the *venire facias*,

<sup>1</sup> 5 Co. 75.

<sup>m</sup> R. E. 18 Car. II.

<sup>n</sup> 7 Mod. 51. 1 Salk. 5.

<sup>o</sup> 4 Ld. Raym. 329. Carth.

447. 5 Mod. 399. 12 Mod.

119. S. C.

<sup>p</sup> 7 Mod. 51. 1 Salk. 5.

<sup>q</sup> 3 Bur. 1682.

*facias*, or process to bring in the jury, as follows:  
 “ Therefore let a jury thereupon come, before our lord  
 “ the king at Westminster, on (the return of the writ,  
 “ being a day certain), by whom, &c. and who nei-  
 “ ther, &c. to recognise, &c. because as well, &c.<sup>r</sup>;  
 “ the same day is given to the parties aforesaid,  
 “ at the same place<sup>s</sup>.” If there are several issues  
 in fact, triable by the country, the conclusion is as  
 follows “ Therefore as well to try this issue, as the  
 “ said other issue, or issues, above joined between the  
 “ parties aforesaid, let a jury thereupon come, &c.<sup>r</sup>.”  
 Or if there are several defendants, who pleads sepa-  
 rately, the award of the *venire facias* states between  
 whom the different issues are joined, thus: “ There-  
 “ fore as well as to try this issue, as the said other  
 “ issue, or issues, above joined between the said A. B.  
 “ and C. D. &c. let a jury thereupon come, &c.<sup>u</sup>.”

Where there are several defendants, some of  
 whom plead, and others let judgment go by de-  
 fault, the *venire facias* is awarded specially, as  
 well to try the issues, as to assess the damages  
 against the latter defendants. In this case, as it  
 is a rule that the jury who try the issues, shall  
 assess

<sup>r</sup> For the explanation of these *et cetera*, see the writ of *venire facias*, *post.* Chap. XXXV.

<sup>s</sup> Apend. Chap. XXXI.

§ 1.

<sup>r</sup> *Id.* § 5.

<sup>u</sup> *Id.* § 7.

assess the whole of the damages<sup>v</sup>, there is an entry of an *unica taxatio* as follows: “ *And because it is convenient and necessary that there be but one taxation of damages in this suit, therefore let the giving of judgment in this behalf against the said C. D. (the defendant who let judgment go by default) be stayed, until the trial and determination of the said issue, or issues, above joined between the said A. B. and the said E. F.*” (the other defendants<sup>w</sup>).

If there be several issues, in fact and in law, the award of the *venire* is, as well to try the former, as to assess the damages upon the latter; *absolutely*, if the issues in law have been already determined in favour of the plaintiff, or otherwise *conditionally*, in case judgment shall be thereupon given for him<sup>x</sup>. In these cases, if the issues in law are first determined, and the plaintiff is in consequence entitled to damages upon part of the declaration, or against one of several defendants, there is an entry of an *unica taxatio*, to postpone the assessment of such damages, until the trial of the issues in fact: But if the issues in fact are first tried, an *unica taxatio* is unnecessary; for in such case, the jury who try the issues in fact will of course assess the damages.

In

<sup>v</sup> 11 Co. 5, &c. <sup>w</sup> Append. Chap. XXXI. § 8. <sup>x</sup> *Id.* § 6.

In actions by *original*, the issue is entitled of the same term as the declaration <sup>y</sup>; and begins with a copy of the declaration, without a *memorandum* <sup>z</sup>: And it is not necessary to enter imparlances <sup>s</sup>, if the pleadings are of a subsequent term <sup>a</sup>. This however is sometimes done; and imparlances are commonly entered by the clerk of the papers, between the plea and replication <sup>b</sup>, where they are of different terms, in making up the issue by original, as well as by bill. The award of the *venire facias* by original, is as follows: “ *Therefore it is commanded to the sheriff, that he cause to come before our lord the king, on (a general return day,) wheresoever he shall then be in England, twelve, &c. by whom, &c. and who neither, &c. to recognise, &c. because as well, &c.*” But where the sheriff is a party, or interested in the cause, the *venire* is awarded to the coroner <sup>d</sup>; or if there are two sheriffs, and one of them is interested, to the other <sup>e</sup>; and if the coroner, as well as the sheriff, is interested, the *venire* is awarded to two persons, appointed by the court, called *elisors* <sup>f</sup>. Where the *venire* is laid

<sup>y</sup> Imp. K. B. 541. Or it may be entitled of the term issue is joined, as in actions by bill. *Id.* 398.

<sup>z</sup> Append. Chap. XXXI. § 3.

<sup>a</sup> *Id. ibid.*

<sup>b</sup> *Id.* § 4.

<sup>c</sup> *Id.* § 3.

<sup>d</sup> 2 Lil. P. R. 124. Append. Chap. XXXI. § 16, 17.

<sup>e</sup> Append. Chap. XXXI. § 14, 15.

<sup>f</sup> 3 East, 141. Barnes, 465. Append. Chap. XXI. § 18.

laid in a county-*palatine*, instead of the common award of a *venire facias*, there is a special award of a *mittimus* to the justices there, commanding them to issue the jury-process, and when the cause is tried, to send the record back again, to the court above<sup>g</sup>. At what time the practice originated, of sending records by *mittimus* into counties-palatine, is not quite clear; but so late as the 11 W. III. the court expressly said, they could not order a trial in the county-palatine of *Lancaster*, and therefore they sent the record to be tried in *Yorkshire*, as being the next county<sup>h</sup>.

When a fair and impartial, or at least a satisfactory trial cannot be had, in the county where the action is laid, the court must be moved, on an affidavit of the circumstances, for leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in the next adjoining county<sup>i</sup>: And as the suggestion in such case is not traversable, the court will see that it is necessary, before they give leave to enter it<sup>k</sup>. The cause in that case must be tried in the next adjoining county, though it be a county-palatine<sup>l</sup>. And by the statute 38 Geo.

<sup>g</sup> Append. Chap. XXXI. § 9, 10.

<sup>k</sup> 3 Bur. 1333. By *Ld. Mansfield* and the court. E.

<sup>h</sup> 12 Mod. 313. and see Say.

23 G. III.

Rep. 47. 1 T. R. 368.

<sup>l</sup> 7 T. R. 735. 1 T. R. 363.

<sup>i</sup> Append. Chap. XXXI. § 19.

*contra*.



Geo. III. c. 52. § 1. it is enacted, that “ in every  
 “ action, whether the same be transitory or local,  
 “ which shall be prosecuted or depending in any of  
 “ his Majesty’s courts of record at *Westminster*, if  
 “ the venue in such action be laid in the county of  
 “ any city or town corporate in *England*, the court  
 “ in which such action shall be depending may, at  
 “ the prayer and instance of any plaintiff or defendant,  
 “ direct the issues joined in such action to be tried  
 “ by a jury of the county next adjoining to the  
 “ county of such city or town corporate, and award  
 “ proper writs of *venire* and *distringas* accordingly,  
 “ if the court shall think proper.” The cities of  
*London* and *Westminster*, *Bristol* and *Chester*, and  
 the borough of *Southwark*, are excepted out of this  
 statute<sup>m</sup>. When the action is laid in a place where  
 the king’s writ of *venire* does not run, as in *Wales*<sup>n</sup>  
 and *Berwick upon Tweed*<sup>o</sup>, &c. it is awarded to the  
 sheriff of the next *English* county, upon a sugges-  
 tion that the issue ought to be tried there. In Sir *Pe-*  
*ter Delme*’s case<sup>p</sup>, it was settled, and has ever since  
 been the practice of the court, that if either party  
 would suggest any special matter, about awarding  
 the *venire* out of the common course, he should  
 give

<sup>m</sup> § 10.

1036. and see Append. Chap.

<sup>n</sup> Append. Chap. XXXI. § XXXI. § 21.

20.

<sup>p</sup> 10 Mod. 198.

<sup>o</sup> 2 Bur. 855. 2 Blac. Rep.

give a copy of it to the adverse party, and allow him a reasonable time to consider it, before a *nient dedire* is entered<sup>q</sup>. And where there are several plaintiffs or defendants in a personal action, and one of them dies before issue joined, his death should be suggested, in making up the issue; but otherwise it need not be suggested, till the judgment-roll is made up<sup>r</sup>.

An issue in *fact*, triable by the *record*, may conclude by praying an inspection of it, if the record be of the *same* court<sup>s</sup>; or whether it be of the same, or of a *different* court, the issue may conclude by giving the party pleading a day to produce it<sup>t</sup>. And on an issue in *law*, the demurrer-book concludes as follows: “*But because the court of our lord the king now here is not yet advised, what judgment, to give of and upon the premises, a day is given to the parties aforesaid, before our said lord the king at Westminster, (if by bill, or if by original where-soever, &c.) on (the day appointed for argument), to hear judgment thereon, for that the court of our said lord the king now here is not yet advised thereof, &c.*”

The

<sup>q</sup> 1 Str. 235. Append. Chap. &c. 25.

XXXI. § 11, &c. And for the nature and effect of a *nient dedire*, see 1 Str. 183. <sup>s</sup> Append. Chap. XXXI. § 22, 24.

<sup>t</sup> *Id.* § 23, 25.

<sup>r</sup> 1 Bur. 363. and see Append. Chap. XXXI. § 11,

<sup>u</sup> *Id.* § 26.

The *general issue* or *paper-book* being made up, is delivered to the defendant's attorney or agent; and if there are several defendants, who appear by different attorneys, a copy should be delivered to each of them. In the margin of the paper-book, a conditional rule is given by the clerk of the papers, signifying, that unless the defendant receive the paper-book, and return it by a particular day, to be enrolled, a writ of inquiry will issue, or rule for judgment be entered <sup>v</sup>. If a paper-book be made up and delivered in term-time, or within *four* days exclusive after term, with a rule given thereon, by the clerk of the papers, for bringing the same to be inrolled, and the defendant's attorney do not, within *four* days after the delivery thereof, bring it back, and join with the plaintiff in the special issue or demurrer, or waive his special plea, and give the general issue, or demurrer to any special issue tendered, judgment may be entered and signed, as if no plea had been pleaded. And the clerk of the papers has no discretion to give a rule to return the paper-book in less than *four* days, even though the defendant be under terms to take short notice of trial <sup>w</sup>. But where a plea is not put in in time, so that a paper-book may be made up and delivered in term, or within four days after, yet if it be made up and delivered within eight days after the term, the defendant's

<sup>v</sup> Append. Chap. XXXI. § 27.

<sup>w</sup> *Hale v. Smallwood*, E. 35 G. III.



defendant's attorney is obliged to take it, and return it again in *four* days after the delivery, or judgment may be signed <sup>x</sup>.

If a plea be pleaded in term, or in time after term, and the paper-book be not made up and delivered within *eight* days exclusive after term, if it be an issue to be tried in *London* or *Middlesex*, or a demurrer, the other party is not bound to deliver back the book, till within the first *four* days of the next term; but if it be an issue to be tried at the *assizes*, the defendant's attorney should deliver back the book within *four* days after the delivery thereof, and join in the special issue, or give the general issue, and take notice of trial; or else the plaintiff's attorney may sign judgment by default, as if the defendant had not pleaded <sup>y</sup>. If the paper-book be of an issue in *fact*, the four days for keeping it are reckoned *exclusive*; if of a demurrer, or issue in *law*, they are *inclusive* <sup>z</sup>. And when a paper-book is not returned within the four days, the plaintiff's attorney may afterwards refuse to accept it, and sign judgment <sup>a</sup>; but judgment cannot be signed after the paper-book is accepted, though it be not returned in due time.

Within

<sup>x</sup> R. T. 1 G. II. (a).

<sup>a</sup> Doug. 197. 4 T. R. 195.

<sup>y</sup> *Id. ibid.*

but see Doug. 67. 1 T. R. 16.

<sup>z</sup> R. T. 1 Geo. II. (a); but *semb. contra.*  
see Imp. K. B. 294.

Within the time limited for that purpose, the defendant's attorney or agent either returns the paper-book, or not; and if returned, he either returns it in the state it was delivered to him; or if he has not been ruled to abide by his plea, he may waive the special pleadings, and give the general issue<sup>b</sup>; or if the *similiter* to the replication has been added by the plaintiff, he may strike it out and demur<sup>c</sup>. In the latter case, the plaintiff having joined in demurrer, a demurrer-book is made up by the clerk of the papers, and delivered over to the defendant's attorney; who must return it in twenty-four hours, unless the demurrer be special, and the defendant has not been ruled to abide by his plea, in which case he may still waive his special plea and demurrer, and give the general issue. If the paper-book be returned with the general issue, the plaintiff's attorney makes up and delivers the issue afresh, in the common form.

On the delivery of the issue<sup>d</sup>, or returning the paper-book<sup>e</sup>, the defendant was formerly obliged to pay for copies of the pleadings, except in actions by a pauper<sup>f</sup>, or against an attorney

<sup>b</sup> 2 Salk. 515.

<sup>c</sup> For the form of the notice of having struck out the rejoinder, &c. see Append. Chap. XXXI. § 28.

<sup>d</sup> R. T. 12 W. III. 7 Mod.

51. Say. Rep. 19. *Wenham v. Tristram*, H. 21 G. III.

<sup>e</sup> 5 T. R. 400.

<sup>f</sup> *Id.* 509.

torney<sup>g</sup> or prisoner<sup>h</sup>; and in a *qui tam* action, he paid double<sup>i</sup>. This was called issue-money; on non-payment of which, the plaintiff might have signed judgment<sup>k</sup>. But by a late rule of court<sup>l</sup>, no judgment shall be signed for non-payment of issue-money; but the same shall remain to be taxed, as part of the costs in the cause: Which rule is construed to extend, not only to general issues, but also to all special issues, and the paper and demurrer-books made up therein<sup>m</sup>.

By accepting the issue, or returning the paper-book, the defendant's attorney admits it to be properly made up<sup>n</sup>: And therefore if there be any variance therein from the pleadings delivered, or other irregularity in making it up, the defendant's attorney or agent, instead of accepting it, should take out a judge's summons, and obtain an order for setting it right, as he cannot otherwise take advantage of the irregularity, on a motion in arrest of judgment, or for a new trial.

When the issue is accepted, or the paper-book returned, the plaintiff should enter it on record, and proceed to argument, if an issue in law, or to trial,

<sup>g</sup> Say. Rep. 77.

R. 218.

<sup>h</sup> 2 Wils. 11.

<sup>m</sup> 6 T. R. 477. R. M. 36

<sup>i</sup> But see 3 T. R. 137.

G. III. and see 1 Bos. & Pul.

<sup>k</sup> Barnes, 263. 275. 2 Blac. 292.

Rep. 1098.

<sup>n</sup> 2 Str. 1131. 1266. Say.

<sup>l</sup> R. H. 35 Geo. III. 6 T. Rep. 154. 3 Bur. 1682.

trial, if an issue in fact: And if he neglect to do so, the defendant may compel him, by obtaining a rule from the master<sup>o</sup>, on the back of the issue, entering it with the clerk of the rules, and serving a copy on the plaintiff's attorney. But the defendant cannot give a rule to reply, and enter the issue, in the same term: And if the action be laid in *London* or *Middlesex*, the defendant ought not to give a rule for the plaintiff to enter his issue, the same term it is joined, unless notice of trial has been given: And in a *country* cause, the plaintiff is no ways bound to enter his issue, the same term<sup>p</sup>.

The plaintiff being ruled to enter the issue, must enter it, if in *London* or *Middlesex*, and bring the record into the office, within *four* days after notice of the rule: If in the country, before the *continuance*-day of that term: Otherwise, a *non pros* may be signed, and the defendant shall have his costs<sup>q</sup>. But a judgment of *non pros* cannot be regularly signed, after the issue is entered, though it be not entered within the time allowed by the rule<sup>r</sup>. And where it appeared by affidavit, that the plaintiff's attorney had mislaid the papers, the court ordered the defendant's attorney to give him a copy of the issue, the better to enable him to enter it<sup>s</sup>.

In

<sup>o</sup> Append. Chap. XXXI. Ann. (c).

§ 29, 30.

<sup>r</sup> 1 T. R. 16. but see 4 T.

<sup>p</sup> R. M. 4 Ann. (c).

R. 195. *semb. contra.*

<sup>q</sup> 2 Lil. P. R. 87. R. M. 4

<sup>s</sup> 1 Str. 414.

In order to enter the issue, a *roll* must be obtained, of the term it is joined, from the person appointed to deliver out the rolls of the court<sup>t</sup>; which is called the *issue-roll*<sup>u</sup>. This roll begins with an entry of the *warrants* of attorney for the plaintiff and defendant, which is said to have been introduced by *Wright* Chief-Justice, in the reign of *James* the Second<sup>v</sup>; previous to which time, the warrants of attorney were entered on a separate roll<sup>w</sup>. The declaration and subsequent pleadings are then entered, as in the issue or paper-book; and the entry of them should be made in a full fair hand, with a margin of an inch at least, and a convenient distance at the top, for binding up the same; and at the bottom, that the writing be not rubbed out<sup>x</sup>. The issue being thus entered on the roll, a *number* should be got for it, from the clerk of the judgments, if it be an issue of the same term, or otherwise from the clerk of the treasury; and the roll being numbered, is carried to and *docketed*<sup>y</sup> with the clerk of the judgments, who takes for the entries, after which it is *filed* in the treasury of the court.

In

<sup>t</sup> R. T. 11 & Geo. II.

Salk. 88.

<sup>u</sup> Append. Chap. XXXI. §

<sup>x</sup> R. H. 1657.

31, &c.

<sup>v</sup> R. E. 4 Jac. II.

<sup>y</sup> For the form of the docket-paper, see Append. Chap.

<sup>w</sup> 1 Ld. Raym. 509. 2 Ld.

XXXI. § 36.

Raym. 895. Carth. 517. 1



In practice, it is not usual to enter the issue at full length, if triable by the country, until after the trial, unless the plaintiff be ruled to enter it; but only to make an *incipitur* on the roll, at the time of passing the record of *Nisi Prius*. An *incipitur* however is necessary; it being declared, by rule of court <sup>z</sup>, that no record of *Nisi Prius* shall be sealed, or passed at the *Nisi Prius* office, before the issue is fairly entered on record, or an *incipitur* thereof; and such entry, with the record of *Nisi Prius*, first brought to be signed by the secondary.

Hitherto we have spoken only of issues made up and entered by the *plaintiff*: But in actions of *replevin*, *prohibition*, and *quare impedit*, wherein the defendant is considered as an actor, the issue may be made up and entered by the *defendant*, as well as the plaintiff. And there is a rule of court <sup>a</sup>, that if the plaintiff *demur* in law to the defendant's plea, rejoinder or rebutter, and the defendant join in demurrer, the plaintiff's attorney shall enter the demurrer of record; and in default thereof, upon a rule given by the secondary <sup>b</sup>, it may be entered of record by the defendant's attorney. Accordingly, if the plaintiff demur, or take issue on the defendant's plea, rejoinder or rebutter, and the defendant, in case of a demurrer, join therein, and the plaintiff

<sup>z</sup> R. M. 5 Ann. reg. 1.

<sup>b</sup> Append. Chap. XXXI.

<sup>a</sup> R. E. 11 W. III.

§ 30.

plaintiff will not make up the book, and enter it on record, the defendant may, pursuant to this rule, make up the book, and deliver it to the plaintiff, who has a right to enter the issue, at any time before the expiration of the rule given by the secondary; which rule ought to be served on the plaintiff, at the same time the book is delivered to him. If the plaintiff do not enter the issue, the defendant may, at the expiration of the rule, and give notice of trial by *proviso* <sup>c</sup>.

<sup>c</sup> R. E. 11 W. III. (a).

CHAP.

## CHAPTER XXXII.

*Of ARGUING DEMURRERS.*

WHEN the issue in law, upon a demurrer, has been entered on record by the plaintiff, or in his default by the defendant, either party may move the court for a *concilium*, and proceed to argument<sup>a</sup>.

Where there are several issues, in law and in fact, there has been great diversity of opinion upon the question, which of them should be first tried or determined. According to the earlier authorities, if a man demur to part, and take issue on other part, or if the declaration be against two defendants, and one demur and the other take issue, the court shall determine which they please first<sup>b</sup>; though it was reckoned the more orderly way to give judgment first on the demurrer<sup>c</sup>. In another book it is said, that the issue in fact ought to be first tried; because if this be found for the plaintiff, the jury who try it may assess conditional damages, as to the demurrer<sup>d</sup>. But according to the later cases, where there are several issues, in law and in fact,

<sup>a</sup> R. T. 1 Geo. II. (a).

<sup>c</sup> Co. Lit. 72. a.

<sup>b</sup> Co. Lit. 72. a. Gilb. C.

<sup>d</sup> Say. Dam. 115. cites Lutw.



fact, the determination of the issue in law may be either before or after the trial of the other, at the election of the plaintiff <sup>e</sup>. In practice, it is usual and advisable to determine the issue in law first, for the following reasons; first, that the determination of an issue in law is generally more expeditious, and less expensive, than the trial of an issue in fact: secondly, that if the issue in law go to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact; whereas, if the issue in fact be first tried, and found for the plaintiff, he must still proceed to the determination of the issue in law, and if that be found against him, he will not be allowed his costs of the trial of the issue in fact: And lastly, that whether the demurrer go to the whole or part of the cause of action, if the plaintiff proceed to argue it first, and the court are of opinion against him, he may amend as at common law; but after the cause has been carried down to trial, he cannot amend any farther than is allowable by the statutes of amendments.

The *concilium, dies concilii*, or day to hear the counsel of both parties <sup>f</sup>, was formerly moved for, upon reading the record in court <sup>g</sup>; but now it is a motion of course, which only requires a counsel's signature: Still however the record is taken  
to

<sup>e</sup> 2 Lil. P. R. 85. R. E. 23  
Car. I. B. R.

<sup>f</sup> R. E. 2 Jac. II.

<sup>g</sup> *Id.* 2 Lil. P. R. 421

to the clerk of the papers, who marks it *read*, and signs the initials of his name on the brief or motion-paper; which being carried to the clerk of the rules, he draws up the rule thereon, which is a four-day rule, and then the cause is entered for argument with the clerk of the papers <sup>h</sup>. It is not necessary, though usual, for the plaintiff to serve the rule for the *concilium* upon a demurrer, or to give notice of putting it in the paper; it being in strictness the defendant's duty to search <sup>i</sup>. Signing a *concilium* is considered as a step in the cause, so as to make it unnecessary to give a term's notice <sup>j</sup>.

Previous to the day appointed for argument, copies of the demurrer-books should be delivered by the plaintiff or his attorney, on unstamped paper, to the chief-justice and *senior* judge, and by the defendant or his attorney, to the two other judges <sup>k</sup>; in which should be inserted the names of the counsel who signed the pleadings <sup>l</sup>: and the exceptions intended to be insisted upon in argument, should be marked in the margin <sup>m</sup>. In causes entered for argument on *Tuesday*, the books, we have seen, are to be delivered to the chief-justice, and the rest of the judges, on the *Saturday* preceding;

<sup>h</sup> R. T. 1 G. II. (a).

<sup>l</sup> R. E. 18 Car. II.

<sup>i</sup> 2 Str. 1242.

<sup>m</sup> R. E. 2 Jac. II. revived

<sup>j</sup> 3 T. R. 530.

by R. H. 38 G. III.

<sup>k</sup> R. M. 17 Car. I

ceding; and in those entered for argument on *Friday*, they are to be delivered on the *Tuesday* preceding<sup>n</sup>. If either party neglect to deliver the books, they ought to be delivered by the other; and the party neglecting shall not be heard, until he have paid for them<sup>o</sup>.

The judgment for the plaintiff, or demurrer to a plea or replication in abatement, is not final, but only a *respondeas ouster*<sup>p</sup>: In other cases, it is interlocutory or final, according to the nature of the action: If the action be for damages in *assumpsit*, &c. it is interlocutory, and should be signed, on treble-penny stamped paper, with the clerk of the judgments, after which the damages should be assessed, on a writ of inquiry<sup>q</sup>, or reference to the master; but in *debt*, &c. for a sum certain, the judgment is final, except where it is necessary to proceed on the statute 8 & 9 W. III. c. 11. § 8.<sup>r</sup>; and there being no necessity for a rule for judgment<sup>s</sup>, the plaintiff may immediately tax his costs, and take out execution.

<sup>n</sup> R. T. 40 G. III. I East, 131. and see R. E. 2 Jac. II. (a). *Ante*, 460.

<sup>o</sup> R. M. 17 Car. I:

<sup>p</sup> Gilb. C. P. 53. 1 Ld. Raym. 351. Say. Rep. 46. 2 Wils. 367. *Ante*, 588, 9.

<sup>q</sup> On the execution of a writ

of inquiry, after judgment on demurrer, it is not competent to the defendant to controvert any thing but the amount of the sum in demand. 1 Bos. & Pul. 368.

<sup>r</sup> *Ante*, 508, 9, 10.

<sup>s</sup> 1 Str. 425.

## CHAPTER XXXIII.

*Of the ISSUE, and TRIAL by the RECORD.*

THE issue we are now treating of, arises upon a plea or replication of *nul.tiel record*. The plea of *nul.tiel record* is always concluded with an averment, and prayer of judgment *si actio*, &c.<sup>a</sup>; and if it deny the existence of a record of the *same* court, the replication thereto may conclude with a prayer *that it be viewed and inspected by the court*<sup>b</sup>: but where the record is of *another* court, the plaintiff shall have a day given him to bring it in<sup>c</sup>.

Where a judgment, or other matter of record, in the *same* court is pleaded, and the plaintiff replies *nul.tiel record*, the replication may conclude as follows,  
 “ *and this he is ready to verify, &c. and because the*  
 “ *court of our lord the king now here will advise them-*  
 “ *selves, upon inspection and examination of the record,*  
 “ *by the said (defendant) above alleged, a day is given*  
 “ *to the parties aforesaid, before our said lord the king*  
 “ *at Westminster, until, &c.*<sup>d</sup>:” or, instead of replying,  
 the

<sup>a</sup> 2 Wils. 114.

330, 31.\*

<sup>b</sup> Herne, 278. 2 Lutw. 1514.  
Barnes, 336.<sup>d</sup> Dyer, 227, 8. 2 Lutw.  
1514. 2 Salk. 566. Carth. 517.<sup>c</sup> 2 Salk. 566. 3 Blac. Com.

1 Ld. Raym. 550. S. C.

the plaintiff may crave *oyer* of the record, or at least a note in writing of the term and number-roll, and if it be not given him in convenient time, he may sign judgment. This practice was originally confined to pleas in abatement<sup>e</sup>; but was afterwards extended to pleas in bar<sup>f</sup>: and accordingly it is now settled, that wherever a judgment or matter of record in the *same* court is pleaded, the party pleading it must, on demand, give a note in writing of the term and number-roll, whereon such judgment or matter of record is entered and filed, or in default thereof, the plea is not to be received<sup>g</sup>. Where the record is of *another* court, the plaintiff may either conclude his replication of *nul tiel record*, by giving the defendant a day to bring it in, or with an averment and prayer of the debt and damages<sup>h</sup>: In the former case, the issue is complete upon the replication<sup>i</sup>; but in the latter, there ought to be a rejoinder, that there is such a record<sup>j</sup>, &c.

This issue is triable by the record itself, if it be of the same court; or by the *tenor* of the record, if it be of a different court<sup>k</sup>. Where the record is  
of

<sup>e</sup> Keilw. 95, 6. Carth. 453.  
517. 1 Ld. Raym. 347. 550.  
2 Ld. Raym. 1179.

<sup>f</sup> 2 Str. 823.

<sup>g</sup> R. T. 5 & 6 Geo. II. (b).  
*Ante*, 529.

<sup>h</sup> Barnes, 161. 2 Wils. 113.

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<sup>i</sup> Cas. Pr. C. P. 56. Pr.  
Reg. 227, 8. Barnes, 161. 335,  
6. Com. Rep. 533. 2 Bos. &  
Pul. 302.

<sup>j</sup> 1 Ld. Raym. 550.

<sup>k</sup> Bul. *Ni. Pri.* 230. Gilb.  
Evid. 26. 2 Bur. 1034.

E



of the *same* court, and the plaintiff avers its existence, *notice* is given to the defendant's attorney, that he will produce it on a particular day; being a general return-day, or day certain, according to the nature of the proceedings: And if he be not then ready, it seems that he may *continue* the day for bringing in the record<sup>1</sup>. But where the existence of the record is averred by the defendant, the plaintiff's attorney gives him a four-day *rule* to produce it, which he obtains from the master, on the paper-book; and having entered it with the clerk of the rules, serves a copy on the defendant's attorney.

On the day appointed for producing the record, the issue being previously entered, is brought into court; and proclamation being made by the crier, for producing the record, it is or is not produced. If produced, the party producing it is entitled to judgment, that he hath *perfected* the record; but otherwise the judgment is given for the adverse party, that he hath *failed* in producing it<sup>m</sup>. If the defendant plead in abatement, another action depending for the same cause, and the plaintiff afterwards discontinue such action, the issue on *nul tiel record* must be found against him; because the plea was true at the time of pleading it: but if a recovery be pleaded in bar, and the judgment afterwards

<sup>1</sup> Barnes, 85.

<sup>m</sup> 3 Salk. 151. and see 7 T. R. 447. (d).

afterwards reversed, before the day given to bring in the record, there, upon *nul tiel record*, the issue must be found for the plaintiff; because by the reversal, the record is avoided *ab initio*<sup>n</sup>.

Where the record is of a *different* court, the mode of proceeding for bringing in the tenor of it, is by *certiorari*; which, we have seen<sup>o</sup>, is a writ issuing sometimes out of *Chancery*, and sometimes out of the *King's Bench*. And where *nul tiel record* is pleaded, to the record of a superior court, or court of equal jurisdiction, there is no way to have it, but by *certiorari* and *mittimus* out of *Chancery*<sup>p</sup>; for one court is not bounded by the other, in point of jurisdiction, nor can they write to each other to certify their records: But the *Chancery* may, by its original constitution, award a *certiorari*, for bringing up the tenor of the record of a superior court, and afterwards send it by *mittimus* to another; and the certifying such tenor does not hinder the court where the record is, from proceeding upon it: And this method was contrived, to communicate evidence of the record from one superior court to another, without the actual removal of the record itself<sup>q</sup>.

If

<sup>n</sup> 1 Lord Raym. 274. 2 Ld. Raym. 1014. 1 Salk. 329 S. C.      <sup>p</sup> 2 Burr. 1034. and see Cro. Car. 297.

<sup>q</sup> Gilb. *Exec.* 145. 153.

<sup>o</sup> *Ante*, 329.      169. and see Gilb. *Evid.* 15.

If a recovery in an inferior court be declared on, or pleaded in a superior one, and denied, the *certiorari* may be issued out of the superior court <sup>r</sup>, as well as from the court of Chancery <sup>s</sup>. And on this writ, where the superior court doth not send for the record of an inferior one, to see whether they keep within the limits of their jurisdiction, but merely, on *nul tiel record*, to know whether there be such a record or not, it is sufficient to certify the *tenor* of the record <sup>t</sup>; and in Chancery they seldom certify any thing more, for that court does not in general send for the record of the inferior one, to bound their jurisdiction, but to send it to other courts by *mittimus* <sup>u</sup>: But where the record is to be proceeded upon in a superior court, the record itself must be returned <sup>v</sup>.

On a replication of *nul tiel record* to a plea in abatement, the judgment for the plaintiff is not final, but only a *respondeat ouster*; for failure of record in this case is not peremptory <sup>w</sup>. In other cases, the judgment is interlocutory or final, as upon demurrer; and if it be final, a rule for judgment must be given, which expires in four days exclusive, but otherwise the rule for judgment is not given till the return of the inquiry <sup>x</sup>.

<sup>r</sup> Cro. Eliz. 821.

<sup>v</sup> 2 Atk. 317. *Ante*, 334, 5.

<sup>s</sup> Gilb. Exec. 148, 9. 170.

<sup>w</sup> Carth. 517. 1 Ld. Raym.

<sup>t</sup> *Id.* 143. Dyer, 187. 3

550. *Ante*, 588, 9. 687.

Salk. 296. 2 Atk. 317, 18.

<sup>x</sup> Imp. K. B. 290. Barnes,

<sup>u</sup> Gilb. Exec. 145.

264.



## CHAPTER XXXIV.

*Of PROCEEDINGS upon an ISSUE, triable by the COUNTRY.*

PREVIOUS to the sitting or assizes, at which the cause is intended to be tried, the plaintiff should give due notice of trial; and if he proceed to trial, without giving such notice, the verdict may be set aside for irregularity. Every notice of trial ought to be in writing<sup>a</sup>; and given to the defendant, if he appear in person, or otherwise to his attorney or agent in town, if his place of abode be known<sup>b</sup>; but if it be unknown, the notice may be given to the defendant himself: And where the defendant is a prisoner, notice of trial may be given to the turnkey<sup>c</sup>.

Upon the delivery of a paper-book, wherein issue is joined, and notice of trial given, (as it may be,) on the back of the book, if the special pleadings be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue, shall serve for notice of trial upon the general issue<sup>d</sup>. And so where the plaintiff, upon any pleading of the defendant,

tenders

<sup>a</sup> R. M. 4 Ann. (c).

<sup>c</sup> 1 Str. 248. *Ante*, 319.

<sup>b</sup> Say. Rep. 133.

<sup>d</sup> R. H. 8 Geo. I. (a).

tenders an issue, and the paper-book is made up and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, if judgment be given thereon for the plaintiff, and a writ of inquiry be necessary to ascertain the damages, the same notice that was given for the trial of the issue, shall serve for executing the writ of inquiry <sup>e</sup>: but then, the plaintiff ought to give notice of the hour and place of executing it <sup>f</sup>.

Notice of trial may be, and is usually given on the back of the issue or paper-book; or it may be given on a separate paper <sup>g</sup>. In the former case, it need not be so particular as in the latter: and therefore, where the issue was indorsed as follows, "Take notice of trial at the next assizes," this was held to be a sufficient notice, without any mention of the date, county, or attorney's name; though it would have been otherwise, if given on a separate paper <sup>h</sup>. Where there are several defendants, and one of them pleads, and the other lets judgment go by default, the notice should express that the issue joined with the former will be tried, and that the jury will at the same time assess the damages against the latter <sup>i</sup>.

If

<sup>e</sup> Same rule. *Ante*, 520.      <sup>h</sup> 2 Str. 1237.

<sup>f</sup> *Idem* (a).

<sup>i</sup> Append. Chap. XXXIV.

<sup>g</sup> Append. Chap. XXXIV. § 4.

§ 1, &c.

If the venue be laid in *London* or *Middlesex*, and the defendant live within forty *computed*<sup>j</sup> miles of *London*, there must be *eight* days notice of trial, exclusive of the day it is given, but inclusive of that on which the trial is to be had; and if the defendant live above forty computed miles from *London*, then *fourteen* days notice must be given<sup>k</sup>. In country causes, eight days notice of trial seems to have been formerly sufficient; but now, by statute 14 *Geo. II.* c. 17. § 4. “where the defendant resides above forty miles from town, no cause shall be tried at *Nisi Prius*, either at the assizes or sittings in *London* or *Westminster*, unless notice of trial in writing has been given, at least *ten* days before such intended trial:” and hence *ten* days notice of trial is required, in all cases, at the *assizes*. But as this statute has no negative words, it is still necessary to give *fourteen* days notice of trial, for the sittings in *London* or *Westminster*, where the defendant lives above forty computed miles from *London*. And where a defendant, residing in town at the issuing of the writ, changes his residence permanently to the country, at the distance of above forty miles from town, before the delivery of the issue, he is entitled to fourteen days notice of trial<sup>l</sup>. If there be several defendants, and one of them reside within

<sup>j</sup> 2 Str. 954. 1216.

<sup>l</sup> 1 East, 688.

<sup>k</sup> R. M. 4 Ann. (c).

within forty miles of *London*, so long a notice is said not to be necessary <sup>m</sup>. The venue was laid in *London*, and the defendant residing in *India*, a verdict for the plaintiff was set aside, because only *eight* days notice of trial had been given <sup>n</sup>.

Upon an *old* issue, or in other words, where there have been no proceedings for four terms exclusive after issue joined, a term's notice is requisite <sup>o</sup>; which notice must be given before the essoign-day of the fifth, or other subsequent term <sup>p</sup>: And a judge's summons, if no order has been made upon it, is not a proceeding within the meaning of this rule; nor the suing out of a *venire facias* or *distringas*, in the vacation of the fourth term, though it be tested and entered as of that term <sup>q</sup>: But a notice of trial, though countermanded, or notice that the plaintiff will proceed in the cause, which has not been acted under, is such a proceeding, as will prevent the necessity of giving a term's notice <sup>r</sup>. The rule requiring a term's notice does not extend to a motion for judgment as in case of a nonsuit <sup>s</sup>; and being confined to *voluntary* delays, it does not apply, where the cause has been stayed by *injunction* or *privilege* <sup>t</sup>, or where there has been an agreement to stay proceedings for a limited time,

to

<sup>m</sup> *Per Ashhurst*, Just. 4 T. R. 520.

<sup>n</sup> 4 T. R. 552.

<sup>o</sup> 2 Salk. 645. 650. R. M. 4 Ann. (c); and see Appendix. Chap. XXXIV. § 6.

<sup>p</sup> 1 Str. 211. 2 Str. 1164. <sup>q</sup> 2 Salk. 457. 650.

<sup>r</sup> 1 Str. 531. 3 East, 1.

<sup>s</sup> 5 T. R. 634.

<sup>t</sup> 1 Sid. 92. R. M. 4 Ann. (c). Doug. 71.

to enable the defendant to pay the debt, in default of which the plaintiff is to be at liberty to proceed<sup>u</sup>. *Short* notice of trial, in country causes, must be given *four* days at least before the commission-day, one exclusive and the other inclusive<sup>v</sup>: In town causes, *two* days notice seems to be sufficient<sup>w</sup>; but it is usual to give as much more, as the time will admit of. And *Sunday* is to be accounted a day in these notices, unless it be the day on which the notice is given<sup>x</sup>.

If the plaintiff be not ready to proceed to trial, pursuant to notice, he may *countermand* or in some cases *continue* it. Notice of countermand, like notice of trial, ought to be in writing<sup>y</sup>; and may be given to the attorney in the country, as well as the agent in town<sup>z</sup>. Before the statute 14 *Geo. II.* c. 17. *two* days notice of countermand appears to have been sufficient in all cases, unless it was for a trial at the assizes, and the countermand was given to the agent in town; in which case it was required to be given, *four* days before the commission-day<sup>a</sup>. But now, by that statute, § 5. the countermand of notice  
of

<sup>u</sup> 2 Bur. 660. 2 Blac. Rep.

<sup>y</sup> *Id. ibid.*

762. 784.

<sup>z</sup> 2 Str. 1073.; and see Appendix. Chap. XXXIV. § 8.

<sup>v</sup> R. E. 30 Geo. III. 3 T. R. 660.

<sup>a</sup> R. M. 4 Ann. (c). 2 St.

<sup>w</sup> Pr. Reg. 390.

849. 1073.

<sup>x</sup> R. M. 4 Ann. (c).



of trial at the assizes, or in a town-cause where the defendant lives above forty miles from *London*, must be given *six* days at least before the intended trial: In other cases, *two* days notice of countermand is still sufficient, the day of countermand being one, exclusive of the commission-day, or day of sittings.

If the plaintiff give notice of trial, and proceed not accordingly, he cannot in general take the cause down to trial again, without new notice, to be given as before, unless by consent or rule of court<sup>b</sup>. But if notice of trial be given for a day certain in *London* or *Middlesex*, and the plaintiff be not ready to proceed, the cause may be tried at the next sitting, upon giving two days previous notice, one inclusive and the other exclusive; which is called a notice of trial by *continuance*<sup>c</sup>. So, if the defendant enter a *ne recipiatur*, and by that means hinder the plaintiff from trying his cause at one sitting, the plaintiff may proceed to trial at the next, upon notice given before the rising of the court at the first sitting<sup>d</sup>. But the plaintiff cannot continue his notice of trial, more than once in a term<sup>e</sup>. And in either of the before-mentioned cases, if the cause be not tried at such  
next

<sup>b</sup> R. M. 1654. § 18.

<sup>d</sup> R. M. 4 Ann. 2 Salk.

<sup>c</sup> Append. Chap. XXXIV. 653.

§ 7.

<sup>e</sup> 2 Str. 1119.



next sitting, notice is to be given as at first, unless it be made a *remanet*<sup>f</sup>, and then new notice of trial is never given, for the defendant is bound to attend till the cause be tried<sup>g</sup>. But if the trial be put off by rule of court, there must be a fresh notice of trial<sup>h</sup>: and even when the plaintiff gives a peremptory undertaking, to try at the next sittings or assizes, there also a new notice of trial must be given; because notwithstanding such undertaking, the plaintiff may decline trying his cause<sup>i</sup>.

If the plaintiff do not proceed to trial pursuant to notice, or countermand it in time, the defendant, on a proper affidavit<sup>j</sup>, shall be allowed his costs of the day<sup>k</sup>; and if they are not paid, may on an affidavit of demand and refusal<sup>l</sup>, have an attachment: or, after the issue is entered, he may proceed to trial by *proviso*, as at common law, or move the court for judgment as in case of a nonsuit, upon the statute 14 Geo. II. c. 17. But the defendant cannot move for judgment as in case of a nonsuit, and costs for not proceeding

<sup>f</sup> When a cause is made a *remanet*, the costs of the first sittings or assizes abide the event of the trial. Say. Rep. 272. 4 Bur. 1988.

<sup>g</sup> R. M. 4 Ann. (c). 8 T. R. 245, 6.

<sup>h</sup> 8 T. R. 245, 6.

<sup>i</sup> *Id. ibid.* Monk v. Wade, T. 29 G. III. K. B.

<sup>j</sup> Append. Chap. XXXIV. § 9, 10.

<sup>k</sup> R. M. 1654. § 18. R. M. 4 Ann. (c).

<sup>l</sup> Append. Chap. XXXIV. § 11.

ing to trial, at the same time<sup>m</sup>; though he may move for either of them separately, and it is indifferent which is first moved for. In practice, it is usual for the defendant to move for judgment as in a case of nonsuit; and then if the court, on shewing the cause against the rule, grant further time to the plaintiff, it is always on the condition of his paying costs for not proceeding to trial.

The trial by *proviso* is so called, from a clause in the *distringas*, which provides, that if two writs come to the sheriff, he shall only execute and return one of them<sup>n</sup>. And if both the plaintiff and defendant happen to carry down the record, at the same time, the trial shall be by the plaintiff's record, if he enter it with the marshal; but if he do not enter it, the defendant may proceed on *his* record<sup>o</sup>. This trial cannot be had in civil actions, till there has been some laches or default in the plaintiff, in not proceeding to trial, after issue joined; except in cases where the defendant is considered as an actor, as in *replevin*, *prohibition*, and *quare impedit*, which are to have a return, consultation, and writ to the bishop<sup>p</sup>. In criminal cases, the defendant is never allowed to carry down  
the

<sup>m</sup> *Earl of Leicester v. Wood-*  
*en*, M. 21 Geo. II.

<sup>n</sup> 2 Lil. P. R. 612. 617. 2  
East, 206. (a).

<sup>o</sup> R. M. 4 Ann. (c).

<sup>p</sup> 2 Salk. 652. R. M. 4  
Ann. (a); but see 4 T. R.  
767.

the record to trial by *proviso*; because no laches can be imputed to the king<sup>q</sup>. But in indictments of treason or felony, if the attorney-general will delay, the court may give the defendant leave to bring on the trial, as they see fit<sup>r</sup>: So in indictments for misdemeanors, the defendant may, in the first instance, by the consent of the prosecutor, and leave of the attorney-general, carry down the cause to trial; but it shall not be allowed by surprise on the attorney-general, nor without consent of the prosecutor, or some default in him<sup>r</sup>. And it is a rule, that when an indictment is removed hither by the prosecutor, the defendant shall not carry it down to trial, without leave of the court on motion<sup>s</sup>.

Before the defendant can have a trial by *proviso*, the issue must be entered on record; and therefore, unless this be done, the defendant must obtain a rule from the master, and enter it with the clerk of the rules, for the plaintiff to enter the issue; and if it be not entered, he may sign a *non-pros*<sup>t</sup>: If it be, and the plaintiff has been guilty of laches, the defendant should procure from the master, and enter with the clerk of the rules, a rule for a trial by *proviso*<sup>u</sup>; which he may do, after he has given notice

<sup>q</sup> 2 Salk. 652. 6 Mod. 247.  
Willes, 535. 7 T. R. 661. 2  
East, 202.

<sup>r</sup> 2 Salk. 652.

<sup>s</sup> *Id.* 653.

<sup>t</sup> 2 Lil. P. R. 84. 87. 612.  
615. 617. 3 Salk. 362, 3. R.  
M. 4 Ann. (c).

<sup>u</sup> 2 Str. 1055. Append.  
Chap. XXXIV. § 12.

notice of trial<sup>v</sup>. Of a trial by *proviso*, the defendant must give the like notice to the plaintiff, as the plaintiff would have been obliged to give to him<sup>w</sup>: and if he do not proceed to trial according to notice, or countermand it in time, the plaintiff shall have his costs<sup>x</sup>.

The delay and expence attending the trial by *proviso*, gave rise to the statute 14 Geo. II. c. 17. by which it is enacted, “ that where any issue is or  
 “ shall be joined, in any action or suit at law,  
 “ in any of his majesty’s courts of record at *West-*  
 “ *minster*, &c. and the plaintiff or plaintiffs in any  
 “ such action or suit hath or have neglected, or  
 “ shall neglect, to bring such issue on to be tried,  
 “ according to the course and practice of the said  
 “ courts respectively, it shall and may be lawful for  
 “ the judge or judges of the said courts respective-  
 “ ly, at any time after such neglect, upon motion  
 “ made in open court, (due notice having been  
 “ given thereof,) to give the like judgment for the  
 “ defendant or defendants in every such action or  
 “ suit, as in cases of nonsuit; unless the said judge  
 “ or judges shall, upon just cause, and reasonable  
 “ terms, allow any further time for the trial of such  
 “ issue: And if the plaintiff or plaintiffs shall ne-  
 “ glect to try such issue, within the time so allowed,  
 “ then

<sup>v</sup> 1 T. R. 695.

<sup>w</sup> R. M. 1651.

<sup>x</sup> R. M. 4 Ann. (c). 2 Str.

797.

“ then and in every such case, the said judge or  
 “ judges shall proceed to give such judgment as  
 “ aforesaid. Provided always, That all judgments,  
 “ given by virtue of this act, shall be of the like force  
 “ and effect as judgments upon nonsuit, and of no  
 “ other force or effect: Provided also, That the de-  
 “ fendant or defendants shall, upon such judgment,  
 “ be awarded his, her or their costs, in any action or  
 “ suit, where he, she or they would upon nonsuit be  
 “ entitled to the same, and in no other action or suit  
 “ whatsoever.”

This statute has been held to extend to actions brought by *executors* or *administrators*<sup>y</sup>, and to *qui tam* actions<sup>z</sup>, as well as others; and also to the traverse of the return of a *mandamus*<sup>a</sup>: but it does not extend to actions of *replevin*<sup>b</sup>, &c. in which the defendant is considered as an actor, and may therefore enter the issue, and carry down the cause to trial himself: and where there are two defendants, one of whom lets judgment go by default, the other cannot have judgment as in case of a nonsuit<sup>c</sup>. Also, where the cause has been once carried

<sup>y</sup> Willes, 316. Barnes, 130. 317.

S. C. but without costs. *Id.* <sup>c</sup> Say. Rep. 22. Say. Costs,

<sup>z</sup> 1 Wils. 325. Barnes, 315. 163. 1 Wils. 325. S. C. Say. Rep. 103. Say. Costs, 164. S.

<sup>a</sup> Say. Rep. 110. Say. Costs, C. 1 Bur. 358. Say. Costs, 166. S. C. 4 T. R. 689. 168. S. C. Cowp. 483. 3 T.

<sup>b</sup> 1 Blac. Rep. 375. Say. R. 662. *Gosse v. Macauley* and others, T. 42 Geo. III.

5 T. R. 400, but see Barnes,



ried down to trial, the defendant cannot have such judgment, for not carrying it down again <sup>d</sup>.

The *course* and *practice* of the court, referred to by the statute, is that which before regulated the trial by *proviso*; and as the defendant could not have had such trial, until the plaintiff had been guilty of laches <sup>e</sup>, nor until after the issue was entered on record, so neither till then, is he entitled to judgment as in case of a nonsuit. We have seen <sup>f</sup>, that if the action be laid in *London* or *Middlesex*, the defendant ought not to give a rule for the plaintiff to enter his issue, the same term in which it is joined, unless notice of trial hath been given <sup>g</sup>: And accordingly it is held, that in a *town* cause, unless notice of trial has been given, the defendant cannot move for judgment as in case of a nonsuit, the next term after that in which issue was joined, although it was joined early enough, to enable the plaintiff to give notice of trial for the sittings after that term <sup>h</sup>; the plaintiff, in such case, having the whole of the next term to enter the issue, and no laches can be imputed to him till the

<sup>d</sup> 1 T. R. 492. 3 T. R. 1.  
1 H. Blac. 101.

<sup>e</sup> For the time within which issues must have been formerly tried, see R. H. 15, 16 Car. II. Reg. 2. R. H. 20, 21 Car. II.

<sup>f</sup> *Ante*, 680.

<sup>g</sup> But the defendant may rule the plaintiff to enter the issue, and move for judgment as in case of a nonsuit, the same term. 1 Bos. & Pul. 387.

<sup>h</sup> 4 T. R. 557. 1 H. Blac. 65. *contra*; and see 1 H. Blac. 123. 282.



the term after <sup>i</sup>. But if notice of trial has been given, in a *town* cause, for a sitting in or after term, the defendant may move for judgment as in case of a nonsuit the next term, being the term after that in which the issue ought to have been entered <sup>k</sup>. To support a rule for judgment as in case of a nonsuit, in the next term after that in which the issue was joined, the affidavit must state that notice of trial was given for a sitting in or after the preceding term <sup>l</sup>; but in the third or other subsequent term, a general affidavit, stating the term when the issue was joined, is deemed sufficient <sup>m</sup>. In a *country* cause, where notice of trial is given to the assizes, the defendant may move for judgment as in case of a nonsuit, the next term: but the plaintiff is not bound to give notice of trial, till the term succeeding that in which issue was joined <sup>n</sup>; and if he do not, the defendant cannot move for judgment as in case of a nonsuit, till after the next assizes. Where the plaintiff withdraws his record, after entering it for trial, the defendant may have judgment as in case of a nonsuit <sup>o</sup>.

The

<sup>i</sup> Issue was joined in *Easter gerald v. Smith*, T. 36 G. III. term, and notice of trial <sup>k</sup> *Harman v. Gilbert*, M. given for the first sittings in 36 Geo. III. C. B. *Trinity*; and the plaintiff <sup>l</sup> Append. Chap. XXXIV. having continued it till the § 14. sittings after that term, the <sup>m</sup> *Id. ibid.* 1 H. Blac. 282. defendant in the same term, <sup>n</sup> 2 T. R. 734. moved for judgment as in <sup>o</sup> *Read v. Stone*, E. 36 G. case of a nonsuit, which was III. 1 East, 346. refused by the court. *Fitz-*

The rule for judgment as in case of a nonsuit<sup>p</sup> is a rule to shew cause, founded on an affidavit of the state of the proceedings, and of the plaintiff's default in not proceeding to trial; which rule has been held to be sufficient notice of motion within the act<sup>q</sup>; and the roll must be in court, at the time the motion is made. This rule is made absolute of course, on an affidavit of service, unless the plaintiff shew a good cause for not proceeding to trial, as the absence of a material witness, &c. but a slight cause is in general deemed sufficient, even in a *qui tam* action<sup>r</sup>, if the plaintiff will undertake *peremptorily* to try at the next sittings or assizes. The *plaintiff* having become insolvent after issue joined, this was allowed as good cause against judgment as in case of a nonsuit; and the court would not bind him down to a peremptory undertaking, it being alleged, that his creditors were about to decide, whether they would prosecute or abandon the cause<sup>s</sup>. So the insolvency of the *defendant*, after the action brought, is good cause against judgment as in case of a nonsuit<sup>t</sup>; but unless the plaintiff will consent to stay all further proceedings, and to enter a *cesset processus*,

<sup>p</sup> Append. Chap. XXXIV. XXXIV. § 13.

§ 15.

<sup>r</sup> 7 T. R. 178. 1 East, 554.

<sup>q</sup> Lofft, 265. 1 H. Blac.

<sup>s</sup> *Fisher v. Hancock*, H. 36

527. C. P. *contra*. And for Geo. III.

the form of the notice of motion, see Append. Chap.

<sup>t</sup> Doug. 671.

*processus*, the court will bind him down to a peremptory undertaking. The plaintiff in a *qui tam* action on the statute 7 Geo. II. c. 8. withdrew his record, because the broker who negotiated the illegal bargain for stock, refused to give evidence, least he should subject himself to a penalty on the same statute; and the court held this a sufficient reason to discharge a rule for judgment as in case of a nonsuit, for not proceeding to trial; although the witness's liability to be sued would not be removed, till after the end of three succeeding terms <sup>u</sup>. Where the rule to shew cause was discharged, on an affidavit which contained an answer false in itself, the court would not afterwards open the matter, on an affidavit which disproved the contents of the former one <sup>v</sup>.

If the rule be made absolute, the defendant having drawn it up with the clerk of the rules, and got it stamped with a double half-crown stamp, may sign judgment as in case of a nonsuit, and tax his costs, &c. But if further time be given, on a peremptory undertaking, the plaintiff must draw up the rule, and serve a copy of it on the defendant's attorney; after which, if he do not proceed to trial pursuant to his undertaking, the defendant, having obtained an office-copy of the rule, should move the court for judgment, on an affidavit

<sup>u</sup> 7 T. R. 178.

<sup>v</sup> 3 T. R. 405.

vit of the circumstances <sup>w</sup>. And a mistake in the declaration is not a good excuse for not proceeding to trial, pursuant to an undertaking <sup>x</sup>. The statute only gives *costs* to the defendant, where he would have been entitled to them upon a nonsuit: And therefore the tenant is not entitled to costs, in a writ of right <sup>y</sup>; nor are they allowed as against an executor, who merely sues *en auter droit* <sup>z</sup>.

If the defendant be unable to proceed to trial, on account of the absence of a material witness, he may move the court in term-time, or apply to a judge in vacation, on an affidavit of the facts, to put it off till the next term <sup>a</sup>. The application for this purpose should in general be made *two* days at least before the day of trial <sup>b</sup>, if the necessity for it was at that time known to the defendant; if not, it may be made afterwards, even when the cause is called on at *nisi prius* <sup>c</sup>. In that case however, notice should first be given, with a copy of the affidavit to be produced <sup>d</sup>. In other cases also, it is usual, though not necessary, to

<sup>w</sup> Append, Chap. XXXIV.  
§ 16.

<sup>x</sup> Say. Rep. 74. Say. Costs, 166. S. C.

<sup>y</sup> 2 Blac. Rep. 1093.

<sup>z</sup> 4 Bur. 1928. Willes, 316. Barnes, 130, S. C. 2 H. Blac. 277.

<sup>a</sup> It is usual to put off the trial only till the next term,

as mentioned above: But where there is no probability of the defendant's being prepared to try till a more distant time, he may apply to put off the trial till that time.

<sup>b</sup> Barnes, 437.

<sup>c</sup> Peak, Cas. *Ni. Pri.* 97.

<sup>d</sup> Cas. *temp.* Hardw. 128.

to give previous notice of the intended motion <sup>e</sup>. The affidavit should regularly be made by the defendant himself <sup>f</sup>, unless he be abroad, or out of the way; in which case it may be made by his attorney <sup>g</sup>, or a third person: and it in general states, that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavoured, without effect, to get him *subpœna'd*, but that he is in hopes of procuring his future attendance <sup>h</sup>. An affidavit in the common form is sufficient, where no cause of suspicion appears; and it is not necessary to swear to merits in such cases <sup>i</sup>: But if there be any cause of suspicion, the court should be satisfied from circumstances, first, that the person absent is a material witness; secondly, that the party applying has not been guilty of any laches or neglect; and thirdly, that he is in reasonable expectation of being able to procure his attendance, at the time to which the trial is prayed to be deferred <sup>k</sup>.

There

<sup>e</sup> Append. Chap. XXXIV. § 17.

<sup>f</sup> Barnes, 437.

<sup>g</sup> Peake, Cas. *Ni. Pri.* 97.

<sup>h</sup> Append. Chap. XXXIV. § 18. In the common pleas, if the ground of the application be the absence of a material witness, the defendant must

state particularly in his affidavit, in what respect his evidence is material. *Corbin v.*

*Darwinson*, E. 36 Geo. III. C. B.

<sup>i</sup> *Duncan v. Thomasin*, M. 38 Geo. III.

<sup>k</sup> 3 Bur. 1514. 1 Blac. Rep. 514. S. C. and see 1 Blac. Rep. 436.



There are other causes for putting off the trial; such as the illness of the defendant's attorney<sup>1</sup>, or on account of a paper published with intent to influence the jury<sup>m</sup>, &c.: And when any of these occur, the affidavit should be framed accordingly. But the court will not put off a trial, pending a suit relating to the same matter, in a spiritual court<sup>n</sup>: And in an action on a penal statute, they will not put it off, in favour of the *plaintiff*, upon the absence of a material witness<sup>o</sup>.

<sup>1</sup> Say. Rep. 63.

<sup>m</sup> 1 Bur. 512. 4 T. R. 285.

<sup>n</sup> 2 Salk. 646. 649.

<sup>o</sup> *Per* Lord *Kenyon*, as formerly ruled by Lord *Mansfield*, in a *Chester* case; *M.*

38 Geo. III. And in the

common pleas, the court would

not put off the trial, on account of the absence of a ma-

terial witness, by whose evidence the defence of *slavery* was intended to be established.

1 Bos. & Pul. 454.



## CHAPTER XXXV.

*Of the RECORD of NISI PRIUS, JURY, EVIDENCE,  
and WITNESSES.*

HAVING, in the preceding chapter, shewn what is to be done, where the parties are not ready or willing to proceed to trial; I shall next consider, when they are, the preparatory steps to be taken, with regard to the *record of nisi prius, jury, evidence, and witnesses.*

The record of *nisi prius*, which is supposed to be transcribed from the issue-roll, contains an entry of the declaration and pleadings, and the issue or issues joined thereon, with the award of the *venire facias*, as in the issue or paper-book; and is in nature of a commission to the judges at *nisi prius*, for the trial of the cause <sup>a</sup>. It begins with the *placita*, or style of the court, of the term issue was joined; and after the award of the *venire facias*, there is a second *placita* <sup>b</sup>, of the term in or after which the cause is tried; and the record then concludes with an entry, called the *jurata*, as follows:

—— to

<sup>a</sup> Append. Chap. XXXV. in the *Common Pleas*, where  
§ 1. the parties do not go to trial,

<sup>b</sup> For the reason of a second *placita* in the *King's-Bench*, and why it is omitted see Gilb. C. P. 80, 81. 1  
Crompt. 234.

—— to wit. *The jury between A. B. by his attorney plaintiff, and C. D. defendant, of a plea of, &c. (according to the nature of the action,) is respited before our lord the king at Westminster, (or, by original, wheresoever, &c.) until —— (the return of the distringas,) unless the king's right trusty and well-beloved Edward Lord Ellenborough, his majesty's chief-justice, assigned to hold pleas before the king himself, (if in London or Middlesex; or, if at the assizes, unless his majesty's justices assigned to take the assizes, in and for the county of ——,) shall first come on (the day of trial,) at the Guildhall in the said city, (if in London; or if in Middlesex, at Westminster-hall, or, if at the assizes, at the place of trial, in the said county) according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear: Therefore let the sheriff have the bodies of the said jurors, to make the said jury, between the parties aforesaid, of the plea aforesaid, accordingly; the same day is given to the parties aforesaid, at the same place.*

At the assizes, the *jurata* concludes with what is called the *sciendum*, as follows: *And be it known, that the king's writ on record was delivered to the deputy sheriff of the said county, on —— the —— day of —— in the same term, (the last day of term preceding the trial,) before our lord the king at Westminster, to be executed according to law, at his peril.*

The

The record of *nisi prius* was formerly made out by the clerks of the chief-clerk <sup>c</sup>; but it is now done by the attornies, and is to be fairly engrossed, on a press or skin of parchment, stamped with a double half-crown stamp <sup>d</sup>. The record being engrossed, is carried to the *nisi prius* office, where it is sealed and passed; for which is paid seven shillings and sixpence for the first eight sheets, seven shillings for every eight sheets after, and sixpence to the sealer <sup>e</sup>. In *London* and *Middlesex*, all records of *nisi prius* are to be sealed, on or before the respective days appointed by the lord chief-justice, in the sittings-paper, for their trial <sup>f</sup>. And there is an old rule of court, that no record of *nisi prius*, for the trial of an issue at the *assizes*, shall be sealed after the end of three weeks next after the end of the term <sup>g</sup>: But by obtaining a judge's order, for which the clerk is paid two shillings, and which he will procure at his leisure, the record may now be sealed at any time before the *assizes* <sup>h</sup>. In causes which stand over from one sitting to another, the records should be regularly resealed, previous to the sitting to which they

<sup>c</sup> R. T. 1 Jac. II. R. M. former rules of T. 15 Car. II.  
5 Ann. reg. 1. reg. 2. R. H. 15 & 16 Car.

<sup>d</sup> R. M. 5 Ann. reg. 1. (b). II. reg. 2. R. H. 20 & 21  
<sup>e</sup> Same rule, (a). Car. II.

<sup>f</sup> R. E. 7 Geo. I. <sup>h</sup> R. T. 31 Car. II. (a).

<sup>g</sup> R. T. 31 Car. II. and see

they stand over; or in default thereof, the causes cannot be tried<sup>i</sup>.

If the issue has not been previously entered of record, it must be so entered, or at least an *incipitur* made, before the passing of the record of *nisi prius*: For it is a rule of court, that no record of *nisi prius* shall be sealed, or passed at the *nisi prius* office, by the *custos brevium*, or any clerk of that office, before the issue in that cause be fairly entered on record, or an *incipitur* thereof, and such entry, with the record of *nisi prius*, be first brought to and signed by the secondary; for which no fee shall be demanded or paid, but the usual and accustomed fee, due to the chief clerk, for entry of such issue on record<sup>k</sup>. In practice it is usual, when the record has not been previously entered, to make an *incipitur* on a roll of the term issue was joined, and to take the roll, record of *nisi prius*, and draft of the issue, to the clerk of the judgments, who enters the issue, and marks the roll, record and issue-paper, taking three shillings and sixpence for the first ten sheets, and one shilling for every six more.



The first process for convening the *jury*, is a *venire facias*, which is a judicial writ, commanding the sheriff, or other officer to whom it is directed,  
to

<sup>i</sup> R. E. 33 G. III.

E. 1657. and T. 1 Jac. II.

<sup>k</sup> R. M. 5 Ann. reg. 1. See *ante*, 682.  
also the rules of H. 1649.

to *cause to come* before the king at *Westminster*, (by *bill*, or by *original* wheresoever, &c.) on a certain day therein mentioned, twelve free and lawful men of the body of the county<sup>1</sup>, each of whom has *ten* pounds a year of lands, tenements, or rents, at the least<sup>m</sup>, by whom the truth of the matter may be the better known, and who are in no wise of kin either, to the plaintiff or to the defendant, to make a jury of the country between the parties in the action, because as well the plaintiff as the defendant, between whom the matter in variance is, have put themselves upon that jury; and that he return the names of the jurors<sup>n</sup>, &c.

By the statute *Westm. 2.* (13 *Edw. I.*) c. 30. the clause of *nisi prius* was directed to be inserted in the *venire facias*; and at first, the trial was had upon that

<sup>1</sup> Stat. 4 Ann. c. 16. § 6. and see the 24 Geo. II. c. 18. Willes, 597. 1 Wils. 125. S. C.

<sup>m</sup> Stat. 4 & 5 W. & M. c. 24. § 15. and by the 3 G. II. c. 25. § 18. any *leaseholder*, for the term of 500 years absolute, or for any term determinable upon life or lives, of an estate in possession in his own right, of the clear yearly value of *twenty* pounds or upwards, over and above the rent reserved, is qualified to serve upon juries; and in

lified, who is a householder within the city, and has lands, tenements, or personal estate, to the value of *one hundred* pounds. Stat. ult. § 19. Also, by the 4 Geo. II. c. 7. § 2. none shall be returned to serve on juries in *Middlesex*, who have served within the two last terms: and by § 3. *leaseholders* for any term, where the improved rents amount to 50*l.* *per annum*, are liable to serve on juries in *Middlesex*.

<sup>n</sup> Append. Chap. XXXV. § 2, &c.



that writ<sup>o</sup>, as it still is, in the case of a trial at bar. This practice was attended with many inconveniences: for in the first place, the jury were not obliged to attend, under any penalty, on the day of *nisi prius*; and if they did attend, the defendant might have cast an *essoign*, and so the jury, after much expence and trouble, were obliged to return, leaving the cause untried<sup>p</sup>. Another inconvenience was, that the parties, not seeing the panel beforehand, could not be prepared to make their challenges<sup>q</sup>. To obviate this latter inconvenience, it was enacted, by the statute 42 *Edw. III. c. 11.* that “no inquests, except of  
 “assize and gaol-delivery, shall be taken by writ of  
 “*nisi prius*, or otherwise, at the suit of any one,  
 “before the names of all them that shall pass in the  
 “inquests, shall be returned in court.” From thenceforward, the clause of *nisi prius* could not be inserted in the *venire facias*, as was directed by the statute *Westm. 2.*; and therefore it was taken out of that writ, and placed in the *distringas*<sup>r</sup>, as the practice continues to this day. The *venire* too was made returnable on a day before the trial, by which means they got rid of the *essoign* at *nisi prius*: for by the statute of *Marlbridge*, (52 *Hen. III.*) c. 13. “after  
 “a man hath put himself upon any inquest, he shall  
 “have

<sup>o</sup> Gilb. C. P. 74. 2 Salk. 454.

<sup>p</sup> *Id.* 76. 7.

<sup>2</sup> Ld. Raym. 1143. S. C.

<sup>r</sup> *Id.* 77. 2 Salk. 454. 2 Ld.

<sup>p</sup> Gilb. C. P. 74, 5. 78.

Raym. 1143. S. C.



“ have but one essoign, or one default;” and by the statute *Westm. 2. (13 Edw. I.) c. 27.* the essoign shall be allowed him at the *next* day, which is the day of the return of the *venire*<sup>s</sup>. And though the defendant never appears now, upon the return of the *venire*, yet heretofore he was demanded solemnly; and if he made default, there went out a *distringas* against the jury, with a clause in it to distrain the defendant: And if after this, he made default again, it was peremptory, because there was no process left to bring him in<sup>t</sup>. If a *venire* be awarded, and the parties do not go to trial for several terms, a new *venire* is awarded from term to term, and the cause continued by *vicecomes non misit breve*<sup>u</sup>; but the *venire* never in fact issues, till the term when the cause is tried.

The *distringas*, upon which the trial is had, is a judicial writ, commanding the sheriff, or other officer to whom it is directed, to *distrain* the jurors, by all their lands and chattels, &c. so that he may have their bodies before the king at *Westminster*, or (by *original*) wheresoever, &c. on [the first return-day in term, after the trial], or before the chief-justice,

or

<sup>s</sup> Gilb. C. P. 74, 5. 77, 8. 925. S. C.

1 Salk. 216. 2 Ld. Raym. 925.      <sup>u</sup> Gilb. C. P. 83. and see  
S. C. 2 Salk. 454. 2 Ld. Raym. Append. Chap. XXXI. § 32.  
1143. S. C.      34.

<sup>t</sup> 1 Salk. 216. 2 Ld. Raym. .

or judges of assize, if they shall first come on [the day of trial], at [the place where the cause is intended to be tried], to make a certain jury between the said parties, of a plea of, &c. (according to the nature of the action,) and to hear thereof their judgment of many defaults<sup>v</sup>, &c.

After a *distringas* had issued, with a clause of *nisi prius*, if the cause stood over, for default of jurors, till a subsequent term, the plaintiff at common law could not have had a *venire de novo*<sup>w</sup>, unless for some fault in executing or returning the *distringas*<sup>x</sup>; but he must have sued out an *alias* or *pluries distringas*, for bringing in the same jury. And still, if after a *special* jury has been struck, the cause goes off for default of jurors, no new jury can be struck; but the cause must be tried by the jury first appointed<sup>y</sup>. And the same jury shall serve for the trial of the cause, notwithstanding an intermediate change of sheriff's<sup>z</sup>.

But with regard to *common* juries, it is enacted, by the statute 7 & 8 W. III. c. 32. § 1. “that if  
 “any plaintiff or demandant, in any cause depend-  
 “ing in any of the courts at *Westminster*, which  
 “shall be at issue, shall sue forth, or bring to any  
 “sheriff, any writ of *venire facias*, upon which any  
 “writ

<sup>v</sup> Append. Chap. XXXV.

<sup>x</sup> *Id.* 92, 5 T. R. 464.

§ 6.

<sup>y</sup> 5 T. R. 453.

<sup>w</sup> *Gilb. C. P.* 83.

<sup>z</sup> *Cowp.* 412.

“ writ of *habeas corpora* or *distringas*, with a *nisi*  
 “ *prius*, shall issue, in order to the trial of such issue  
 “ at the assizes, and such plaintiff or demandant shall  
 “ not proceed to the trial of the said issue, at the said  
 “ first assizes after the *teste* of every such writ of  
 “ *habeas corpora* or *distringas*, with a *nisi prius*,  
 “ that then and in all such cases, (other than where  
 “ *views* by jurors shall be directed <sup>a</sup>,) the plaintiff or  
 “ demandant, whensoever he shall think fit to try the  
 “ said issue at any other assizes, shall sue forth and  
 “ prosecute a new writ of *venire facias*, directed to  
 “ the sheriff, in this form: That you cause to come  
 “ *anew* <sup>b</sup>, before, &c. twelve free and lawful men of  
 “ the *neighbourhood* of *A*. [now, of the *body* of your  
 “ county,] each of whom has *ten* pounds a year, of  
 “ lands, tenements or rents, at the least, by whom,  
 “ &c. and who neither, &c. and the residue of the  
 “ said writ shall be after the ancient manner; which  
 “ writ being duly returned and filed, a writ of *habeas*  
 “ *corpora* or *distringas*, with a *nisi prius*, shall issue  
 “ thereupon, (for which the ancient and accustomed  
 “ fees shall be taken, and no more, as in the case of  
 “ the *pluries habeas corpora* or *distringas*, with a *nisi*  
 “ *prius*,) upon which the plaintiff or demandant shall  
 “ and may proceed to trial, as if no former writ of  
*venire*

<sup>a</sup> Com. Rep. 248.

<sup>b</sup> Append. Chap. XXXV. § 5.

“ *venire facias* had been prosecuted or filed in that  
 “ cause, and so *toties quoties* as the case shall require.  
 “ And if any defendant or tenant, in any action de-  
 “ pending in any of the said courts, shall be minded  
 “ to bring to trial any issue joined against him, when  
 “ by the course in any of the said courts, he may  
 “ lawfully do the same by *proviso*, such defendant or  
 “ tenant shall or may, of the issuable term next pre-  
 “ ceding such intended trial, to be had at the next  
 “ assizes, sue out a new *venire facias* to the sheriff,  
 “ in form aforesaid, by *proviso*; and prosecute the  
 “ same by writ of *habeas corpora* or *distringas*, with  
 “ a *nisi prius*, as though there had not been any for-  
 “ mer *venire facias* sued out or returned in that  
 “ cause, and so *toties quoties* as the matter shall re-  
 “ quire.”

The *venire* and *distringas* are directed, according  
 to the award of these writs<sup>c</sup>, to the *sheriff* of the  
 county in which the action is laid, or of an adjoin-  
 ing county: but where the sheriff is a party, or  
 interested in the cause, they are directed to the  
*coroner*<sup>c</sup>; or if there are two sheriffs, and one of  
 them is interested, to the other: and if the coro-  
 ner, as well as the sheriff, is interested, the *venire*  
 and *distringas* are directed to *elisors*<sup>c</sup>. In a county-  
*palatine*, the record is sent by *mittimus* to the  
 justices

<sup>c</sup> *Ante*, 672.

justices there, commanding them to issue the jury-process, and when the cause is tried, to send the record back again to the court above <sup>d</sup>.

In point of form, the *venire* and *distringas* are general, or special. Where only one issue is to be tried, or there are several issues of the same nature, the *venire* and *distringas* are general, to make a jury of the country, between the parties, of the plea or action, whatever it may be: But where there are several issues, in fact and in law, or several defendants, and some of them plead and others let judgment go by default, the writs are special, as well to try the issues in fact, as to assess the damages upon the issues in law, or against the defendants who let judgment go by default <sup>e</sup>. If the defendant carry down the cause by *proviso*, the following clause is inserted in the *distringas*: *Provided always, that if two writs shall come to the sheriff, he shall only execute and return one of them* <sup>f</sup>.

The *venire facias* is *tested* on the first day of the term, in or after which the cause is to be tried; and is made *returnable* on some day before the trial, being a *general* return-day, or day *certain*, according to the previous proceedings <sup>g</sup>: If in a country cause,

<sup>d</sup> *Ante*, 672, 3. and see Append. Chap. XXXV. § 12, &c.

Ent. 676. and see Append. Chap. XXXV. § 7.

<sup>e</sup> 2 Lil. P. R. 636. *Ante*, 680, 81. and see Append. Chap. XXXV. § 3, 4.

<sup>g</sup> On the traverse of an inquisition out of chancery, the *venire* is returnable on a general return-day. 1 Wils. 77.

<sup>f</sup> 2 Lil. P. R. 612. 617. Lil.



cause, the *venire* by *original* is made returnable on the last general return-day, or if by *bill*, on the last day of the term, before the assizes: And the *distringas* is tested on the *quarto die post* of the return by *original*, or by *bill* on the return of the *venire*; and made returnable on the first general return-day, or day certain, in term-time, after the trial. It is not necessary by *original*, that there should be fifteen days between the teste and return of the jury-process<sup>h</sup>. The *venire facias* and *distringas* are sued out together; and after being sealed, (for they do not require signing,) are taken to the sheriff's office, to be returned. In causes which stand over from one sitting to another, the writ of *distringas* should be regularly altered and resealed, previous to the sitting to which they stand over; or in default thereof, the causes cannot be tried<sup>i</sup>.

The jury returned by the sheriff, on the *venire facias*, is *common* or *special*. A common jury is nominated, summoned, and returned by the sheriff, pursuant to the *balloting* act, (3 Geo. II. c. 25. § 8.) by which it is enacted; “that every sheriff  
“or other officer, to whom the return of the *venire facias juratores*, or other process for the trial  
“of causes, before justices of assize or *nisi prius*,  
“in any county in *England*, doth or shall belong,  
“shall

<sup>h</sup> Stat. 13 Car. II. stat. 2. c. 2. § 6.    <sup>i</sup> R. E. 33 G. III.

“ shall upon his return of every such writ of *venire*  
“ *facias*, (unless in causes intended to be tried at  
“ bar, or in cases where a special jury shall be  
“ struck by order or rule of court,) annex a panel  
“ to the said writ, containing the christian and sur-  
“ names, additions and places of abode, of a com-  
“ petent number of jurors, named in the lists men-  
“ tioned in the act, as qualified to serve on juries,  
“ (the names of the same persons to be inserted in  
“ the panel, annexed to every *venire facias*,) for the  
“ trial of all issues at the same assizes, in each re-  
“ spective county; which number of jurors shall be  
“ not less than forty-eight in any county, nor more  
“ than seventy-two, without direction of the judges  
“ appointed to go the circuit, and sit as judges of as-  
“ size or *nisi prius* in such county, or one of them,  
“ who are thereby respectively empowered and re-  
“ quired, if he or they see cause, by order under  
“ his or their respective hand or hands, to direct a  
“ greater or lesser number, and then such number  
“ as shall be so directed shall be the number to  
“ serve on such jury; and that the writs of *habeas*  
“ *corpora juratorum*, or *distringas*, subsequent to  
“ such writ of *venire facias juratores*, need not have  
“ inserted in the bodies of such respective writs, the  
“ names of all the persons contained in such panel,  
“ but it shall be sufficient to insert in the mandatory  
“ part of such writs respectively, *the bodies of the*  
“ *several*

“ several persons named in the panel to this writ annexed, or words of the like import, and to annex to such writs respectively, panels, containing the same names as were returned in the panel to such venire facias, with their additions and places of abode, that the parties concerned in any such trials may have timely notice of the jurors who are to serve at the next assizes, in order to make their challenges to them, if there be cause; and that for making the returns and panels aforesaid, and annexing the same to the respective writs, no other fee or fees shall be taken, than what were then allowed by law to be taken for the return of the like writs, and panels annexed to the same; and that the persons named in such panels shall be summoned to serve on juries, at the then next assizes or sessions of *nisi prius*, for the respective counties to be named in such writs, and no other <sup>k</sup>. ”

And by § 11. “ the name of each and every person who shall be summoned and impaneled as aforesaid, with his addition and the place of his abode, shall be written in several and distinct pieces of parchment or paper, being all as near as may be of equal size and bigness, and shall be delivered unto the marshal of such judge of assize or *nisi prius*, &c. who is to try the cause in  
 “ the

<sup>k</sup> See R. E. 1651.

“ the said county, by the under-sheriff of the said  
 “ county, or some agent of his; and shall, by di-  
 “ rection and care of such marshal, be rolled up, all  
 “ as near as may be in the same manner, and put  
 “ together in a box or glass, to be provided for that  
 “ purpose.”

Upon the execution of a writ of inquiry, the plaintiff, we may recollect, sometimes moves the court for a rule to have a *good jury*<sup>1</sup>, which is a better sort of *common jury*<sup>m</sup>: And before the introduction of special juries, this rule appears to have been frequently granted, for the trial of causes at *nisi prius*<sup>n</sup>.

A *special jury* is nominated, in the presence of the attornies on both sides, by the secondary, or master of the King's Bench-office, who makes out a list of forty-eight jurors, from the freeholders' book, or book kept by the sheriff, of persons qualified to serve on juries, out of whom each party is at liberty to strike twelve, and the remaining twenty-four are summoned and returned by the sheriff. Special juries appear to have been first introduced upon trials at bar, in causes of great consequence; wherein the court would anciently make a rule, upon motion and affidavit, for the secondary to name forty-eight freeholders, and that each party should

<sup>1</sup> *Ante*, 513, 19.

<sup>m</sup> 5 T. R. 460.

<sup>n</sup> 1 Str. 265.

should strike out twelve, by one at a time, (the plaintiff or his attorney beginning first,) and that the remaining twenty-four should be the jury, to be returned for the trial of the cause°. A rule having been made accordingly, the plaintiff's attorney attended the secondary, but the defendant's attorney would not attend, and thereupon the secondary nominated forty-eight, in the presence of the plaintiff's attorney only: Upon a motion to set aside this nomination, the court thought fit to order a new jury to be struck; but made it a standing rule for the future, that when the secondary is to strike a jury, he shall give notice to the attornies on both sides to be present, and if one comes and the other does not, he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out the other twelve, for him that is absent<sup>p</sup>. If, by rule of court, the secondary is ordered to strike a jury, in case it be not expressed in the rule that he shall strike forty-eight, and each of the parties shall strike out twelve, the secondary is to strike twenty-four, and the parties have no liberty to strike out any<sup>q</sup>.

Analogous to the practice upon trials at bar, it was sometimes usual, in other cases, where it was conceived an indifferent jury would not be returned,

° 2 Lil. P. R. 123.

T. 8 W. III. reg. 2.

<sup>p</sup> *Id.* 127. 1 Salk. 405. R.

<sup>q</sup> 1 Salk. 405.



ed, for the court upon motion to order the sheriff to attend the secondary, with the freeholders' book, and the secondary, in the presence of the attornies on both sides, to strike a jury<sup>r</sup>. But probable matter must have been shewn to the court, to induce them to grant this rule<sup>s</sup>: and it being doubted, whether it could be had without consent<sup>t</sup>, it was declared and enacted by the statute 3 *Geo. II.* c. 25. § 15. "that it shall and may be lawful to and for his  
 "majesty's courts of King's Bench, &c. on the  
 "motion of any plaintiff or plaintiffs, defendant or  
 "defendants, in any action, cause or suit what-  
 "soever, depending or to be brought and carried  
 "on in the said courts of King's Bench, &c. and  
 "the said courts are thereby authorised and re-  
 "quired, upon motion as aforesaid, to order and  
 "appoint a jury to be struck, before the proper of-  
 "ficer of each respective court, for the trial of any  
 "issue joined in any of the said cases, and triable  
 "by a jury of twelve men, in such manner as spe-  
 "cial juries have been and are usually struck in  
 "such courts respectively, upon trials at bar had in  
 "the said courts; which said jury so struck as  
 "aforesaid, shall be the jury returned for the trial  
 "of the said issue."

Upon this statute it was holden, that the fees for *striking* a special jury should be paid by the party

<sup>r</sup> 2 Lil. P. R. 123.

*Id. Ibid.*

<sup>t</sup> *Id.* 122.

party applying for it; but that the other expences of the trial should abide the event of the suit<sup>u</sup>. This being found inconvenient, gave rise to the statute 24 *Geo. II. c. 18. § 1.* by which it is enacted, “ that  
 “ the party who shall apply for a special jury, shall  
 “ not only bear and pay the fees for striking such  
 “ jury, but shall also pay and discharge all the ex-  
 “ pences, occasioned by the trial of the cause by  
 “ such special jury; and shall not have any further  
 “ or other allowance for the same, upon taxation of  
 “ costs, than such party would have been entitled  
 “ unto, in case the cause had been tried by a com-  
 “ mon jury, unless the judge before whom the  
 “ cause is tried, shall immediately after the trial,  
 “ certify in open court, under his hand, upon the  
 “ back of the record, that the same was a cause  
 “ proper to be tried by a special jury<sup>v</sup>.” And by  
 the same statute, § 2. “ no person who shall serve  
 “ upon a special jury, shall be allowed or take, for  
 “ serving on any such jury, more than the judge  
 “ who tries the cause shall think just and reason-  
 “ able, not exceeding one pound one shilling, ex-  
 “ cept in causes where a view hath been directed.”

Since

<sup>u</sup> Say. Costs, 181. 2 Str. judge cannot certify for the  
 1080. Cas. Pr. C. B. 138. costs of a special jury. 1 Esp.  
 Barnes, 123. S. C. Cas. *Ni. Pri.* 229.

<sup>v</sup> In criminal cases, the

Since the making of this statute, the motion for a special jury is become a motion of course, requiring only counsel's signature; upon which a rule is drawn up by the clerk of the rules, and an appointment obtained thereon from the master, to nominate the forty-eight: Which rule should be drawn up in *London* and *Middlesex*, before the adjournment-day after each term <sup>w</sup>. A copy of this rule and appointment is served upon the opposite attorney, and also on the under-sheriff, who attends the master, at the time appointed, with the freeholder's book; and the nomination being made, lists of the persons nominated are made out for each party, by the master's clerk. Another appointment is then obtained from the master, to reduce the jury, and served on the opposite attorney; upon which the attornies on both sides should attend, and the master will strike out twelve names for each of them, beginning with the plaintiff first, or if either of the attornies does not attend, he will strike out twelve names for him that is absent <sup>x</sup>. The plaintiff, it seems, ought in all cases to sue out the jury-process, even though the special jury be moved for by the defendant <sup>y</sup>; and in *London*, he chuses his own officer to summon them.

The facility of obtaining a rule for a special jury is attended with this inconvenience, that when the

<sup>w</sup> R. T. 30 G. III.    <sup>x</sup> R. T. 8 W. III.    <sup>y</sup> Imp. K. B. 324.  
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the cause is to be tried at a sitting in term, the defendant, by obtaining it, may put off the trial, till the sittings after term, it not being usual to try special jury causes in term-time; by which means, the plaintiff is delayed from getting judgment till the next term, which may be at the distance of some months. To obviate this inconvenience, it might be proper to make the defendant, in such case, undertake to give judgment, of the term in which the cause would otherwise have been tried <sup>z</sup>.

In actions of *waste*, trespass *quare clausum fregit*, and other actions, where it appears to the court to be proper and necessary, that the jurors, whether common or special, who are to try the issues, should, for the better understanding of the evidence, have a *view* of the messuages, lands, or place in question, the court is authorised by the statute 4 *Ann.* c. 16. § 8. “to order special writs of *distringas* or *habeas cor-* “*pore* to issue, by which the sheriff, or other officer “to whom they are directed, shall be commanded “to

<sup>z</sup> In the Common Pleas, when delay is suggested as the true motive for the application for a special jury, and this is not satisfactorily denied on the part of the person applying, the chief-justice directs the cause to be tried in term, unless such terms are submitted to, as obviate the objection; and giving judgment of the term, is not in all cases satisfactory.

“ to have *six* out of the first twelve of the jurors  
 “ named in such writs, or some greater number of  
 “ them, at the place in question, some convenient  
 “ time before the trial, who then and there shall have  
 “ the matters in question shewn to them, by two per-  
 “ sons in the said writs named, to be appointed by  
 “ the court <sup>a</sup>; and the said sheriff or other officer,  
 “ who is to execute the said writs, shall, by a special  
 “ return upon the same, certify that the view hath  
 “ been had, according to the command of the said  
 “ writ.” And by the 3 *Geo.* II. c. 25. § 14. “ where  
 “ a view shall be allowed in any cause, in such case  
 “ six of the jurors named in such panel, or more,  
 “ who shall be mutually consented to by the parties,  
 “ or their agents on both sides, or if they cannot agree,  
 “ shall be named by the proper officer of the re-  
 “ spective courts of King’s Bench, &c. for the causes  
 “ in their respective courts, or if need be, by a judge  
 “ of the respective courts where the cause is depend-  
 “ ing, or by the judge or judges before whom the  
 “ cause shall be brought on to trial respectively, shall  
 “ have the view, and shall be first sworn upon the  
 “ jury to try the cause.”

Before the statute 4 *Ann.* c. 16. there could be  
 no view, till after the cause had been brought on  
 to

<sup>a</sup> Append. Chap. XXXV. § 10, &c.



to trial; when, if the court saw the question involved in any obscurity, which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on again <sup>b</sup>. Upon this statute, it had become the practice to grant a view of course, upon the motion of either party: And a notion having prevailed, that six of the first twelve upon the panel must attend upon the view, and appear at the trial, and that if they did not, the cause must be put off, the judges thought it their duty to interfere, and to take care that their ordering a view should not obstruct the course of justice, and prevent the cause from being tried: for they were all clearly of opinion, that the act of parliament meant that a view should not be granted, unless the court were satisfied that it was proper and necessary; and they thought it better, that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view at all, than that the trial should be delayed for a great length of time. Accordingly they resolved, not to order a view any more, without a full examination into the propriety and necessity of it, unless the party applying would come into such terms, as might prevent an unfair use being made of it <sup>c</sup>. Agreeably to this resolution, they required

<sup>b</sup> 1 Bur 253. 2 Salk. 665. <sup>c</sup> 1 Bur. 253.

quired a consent, which has ever since been made a part of the rule, that in case no view be had, or if a view be had by any of the jurors, though not six of the first twelve, yet the trial shall proceed, and no objection be made on either side, on account thereof, or for want of a proper return to the writ <sup>d</sup>.

In actions of *waste*, and trespass *quare clausum fregit*, the necessity for a view appearing on the face of the pleadings, the motion for it is a motion of course, requiring only counsel's signature; upon which a rule of court <sup>e</sup> is drawn up in term-time, or a judge's order in vacation. But in other cases, a special application must be made for the rule or order, to the court or a judge, upon an affidavit of the circumstances; and it is always made a part of the rule or order, that the expences of taking the view shall be equally borne by both parties, and that no evidence shall be given on either side, at the time of taking thereof <sup>f</sup>. Before the rule or order is drawn up, an application should be made to the opposite attorney, for the name of his shewer; and the names of both shewers must be inserted in the rule or order, and also in the writ of *distringas*, with the time and place of meeting for proceeding on the view. The rule

<sup>d</sup> 1 Bur. 257. and see Append. Chap. XXXV. § 8.

§ 8, 9.

<sup>f</sup> *Id. ibid.*

<sup>e</sup> Append. Chap. XXXV.

rule or order being drawn up, a copy of it must be served on the opposite attorney, and the original left with the sheriff, together with the names of the jurors, if *special*, and he will summon them; if *common*, he will summon such as he thinks proper.



The next circumstance to be attended to is the *Evidence*; for unless the parties are prepared to prove their allegations, it is needless for them to go to trial: And herein, there are two things to be principally considered in every action, first, what is to be proved; and secondly, the manner of proving it. The evidence, in all cases, is governed by the pleadings; it being necessary to prove every thing that is put in issue, and no more. On the general issue, the plaintiff must prove the whole of his case; but on a special issue, it is only necessary to prove the particular point referred to the jury; for whatever is not expressly denied, is admitted by the pleadings. The manner of proof depends on the nature of the evidence, which is written or unwritten<sup>§</sup>: the former is of a *public* or *private* nature, and is either found in the custody of the parties, or of third persons; the latter arises from the testimony of *witnesses*. In general, the parties

§ Gilb. Evid. 5. Bul. N. Pri. 221.

parties must come prepared with the best existing evidence, the nature of the case admits of; and the witnesses must be such, as are not interested in the event of the suit <sup>h</sup>. But when an objection is made to a witness, that admits of any doubt, the courts, of late years, have endeavoured as far as possible, consistently with the old cases, to let the objection go to his *credit*, rather than his *competency* <sup>i</sup>.

The mode of procuring the attendance of witnesses, is by *subpœna ad testificandum*; which is a judicial writ, commanding them to appear at the trial, to *testify* what they know in the cause, on the part of the plaintiff or defendant, as the case is, under the penalty of one hundred pounds each <sup>k</sup>. Four witnesses only can be put in one writ of *subpœna* <sup>l</sup>; and therefore it is frequently necessary to have several writs, which are signed and sealed. And if a cause appointed for one sitting be made a *remanet*, the *subpœna* must be re-sealed and reserved <sup>m</sup>.

If a witness have in his possession any deeds or writings, which it is deemed necessary to produce at the trial, there should be a special clause inserted  
in

<sup>h</sup> Cas. *templ.* Hardw. 358. § 16.

<sup>4</sup> Burr. 2251. 3 T. R. 27.

<sup>l</sup> Cowp. 846.

<sup>i</sup> Same cases; 1 T. R. 300.

<sup>m</sup> Imp. K. B. 367.

<sup>k</sup> Append. Chap. XXXV.

in the *subpœna*, called a *duces tecum*, commanding the witness to bring them with him<sup>n</sup>; or if deeds, &c. are in possession of the opposite party, his attorney or agent, a *notice* should be given to produce them<sup>o</sup>: And even in penal actions, it is not necessary to give the notice to the defendant himself; notice to his attorney or agent being deemed sufficient<sup>p</sup>. In *trover* for a bill of exchange, the defendant must have notice to produce it, or the plaintiff cannot go into evidence of its being in the defendant's possession<sup>q</sup>. And the giving of notice to produce deeds, &c. must be proved at the trial, before the party can insist on the production of them:

<sup>n</sup> Append. Chap. XXXV. § 18. But under a *subpœna duces tecum*, a witness is not compellable to produce private papers in his custody. 1 Esp. Cas. *Ni. Pri.* 405.

<sup>o</sup> The *subpœna*, with a clause of *duces tecum*, and a mere *notice*, ought not to be used indifferently, as if both were calculated to answer the same end. The former is the mandate of the court, to compel a witness to produce at the trial, any written evidence he may be in possession of; and is the regular and proper process for that purpose: But a notice would be only a call upon his candour, to produce such evidence; and his omitting to do

so, would not be punishable as a contempt of the court. The use of a *notice* is, where written evidence is in the hands of an adverse party; in which case, though he is not perhaps, in strictness of law, bound to produce it against himself, yet he may produce it; and therefore the party who wants it cannot be permitted to supply its place by the next best evidence, nor to observe upon a refusal to produce it, without proving a notice to the adverse party or his attorney, having first shewn that it was in his possession or power.

<sup>p</sup> 3 T. R. 306.

<sup>q</sup> 1 Esp. Cas. *Ni. Pri.* 50.



them: It is not sufficient that the attorney admits the receipt of the notice<sup>r</sup>. And where notice has been given to produce books, if the party giving it call for and inspect them, it does not make them evidence for the other party, to whom they belong<sup>s</sup>.

The *subpœna* being issued, a ticket should be made out for each witness<sup>t</sup>, and personally delivered to him<sup>u</sup>, a reasonable time before the day of trial; for witnesses ought to have a convenient time, to put their own affairs in such order, as that their attendance upon the court may be of as little prejudice to themselves as possible<sup>v</sup>: And notice in *London*, at two in the afternoon, for the witness to attend the sittings at *Westminster* that evening, has been held to be too short. Where the witness lives within the weekly bills of mortality, it is usual to leave a shilling with the *subpœna* ticket: but where he lives at a greater distance, he is not obliged to attend, unless his reasonable expences are paid or tendered him, not only for going to, but also for returning from the trial; and where less is offered, the witness is not obliged to trust to the court's allowing him more, when he comes to the book, for perhaps the party  
may

<sup>r</sup> Esp. Cas. *Ni. Pri.* 216. § 17.

<sup>s</sup> *Id.* 210.

<sup>u</sup> 2 Str. 1054.

<sup>t</sup> Append. Chap. XXXV. <sup>v</sup> 1 Str. 510.

may not call him, and then it may be difficult for him to get home again <sup>w</sup>.

If the witness, not having a sufficient excuse, neglect to attend upon the *subpœna*, he is liable to be proceeded against three ways; first, by attachment, for a contempt of the process of the court <sup>x</sup>; secondly, by a special action on the case for damages, at common law <sup>y</sup>; and thirdly, by action on the statute 5 *Eliz.* c. 9. § 12. for the penalty of ten pounds, and also for the further recompence given by that statute, if it has been previously assessed by the court out of which the process issued <sup>z</sup>. An attachment lies against an attorney in the cause, for not attending upon a *subpœna*, to give evidence of collateral facts <sup>a</sup>; and it may be even had against a peer of the realm <sup>b</sup>. But in order to ground this summary mode of proceeding, it is necessary to prove that the witness was personally served <sup>c</sup>, and that his reasonable expences were paid or tendered him <sup>d</sup>. The motion for an attachment against a person *subpœna'd* as a witness, for not attending, should,

<sup>w</sup> 2 Str. 1150. 1 Blac. Rep. 1528. S. C. Cowp. 845. but see 3 Bur. 1687.

<sup>x</sup> 1 Str. 510. 2 Str. 810. <sup>b</sup> Say. Rep. 50. 1 Wils. 1054. 1150. Cowp. 386. Doug. 332. S. C. but *vide ante*, 170, 561.

<sup>y</sup> Doug. 561.

<sup>c</sup> 2 Str. 1054.

<sup>z</sup> *Id. ibid.*

<sup>d</sup> *Id.* 1150. 1 Blac. Rep. 36.

<sup>a</sup> 2 Str. 810. 2 Ld. Raym.

should, as in other cases of contempt, be brought forward as soon as possible: and therefore the court refused an attachment in *Hilary* term, for non-attendance at the preceding summer assizes, and left the party to his civil remedy<sup>e</sup>.

When the witness is detained in prison, a *habeas corpus ad testificandum*<sup>f</sup> is necessary, to bring him up; for which an application is made to the court or a judge, upon an affidavit<sup>g</sup>, sworn to by the party applying<sup>h</sup>, stating that he is a material witness, and willing to attend<sup>i</sup>. Upon this application, the court in their discretion will make a rule, or the judge, if he thinks proper, will grant his *fiat* for the writ, which is then sued out, signed and sealed. But a *habeas corpus ad testificandum* will not lie, to bring up a prisoner of war<sup>k</sup>: And where the application for it appeared to be a mere contrivance, to remove a prisoner in execution, the court refused to grant it<sup>l</sup>. The writ being sued out, should be left with the sheriff, or other officer in whose custody the witness is detained, who will bring him up, on being paid his reasonable charges<sup>m</sup>.

When

<sup>e</sup> — v. *St. Leger*, H. 37  
G. III.

<sup>f</sup> Append. Chap. XXXV.  
§ 21.

<sup>g</sup> *Id.* § 19.

<sup>h</sup> Fortes. 396.

<sup>i</sup> Cowp. 672. *Per Cur.* Hil.  
1780.

<sup>k</sup> Doug. 419.; and see 6 T.  
R. 497. 7 T. R. 745.

<sup>l</sup> 3 Bur. 1440.

<sup>m</sup> 1 Crompt. 248, 9. *Qu.*  
whether the officer may not  
require an *indemnity*, against  
the prisoner's escape? *Id. ibid.*

When a material witness is going, or resides abroad, so that he cannot attend at the trial, the party requiring his testimony may move the court in term-time, or apply to a judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse*, before one of the judges of the court, if he reside in town, or if in the country or abroad, before commissioners specially appointed, and approved of by the opposite party<sup>n</sup>. The rule or order for this purpose cannot be obtained without *consent*; the depositions of witnesses upon interrogatories not being the best existing evidence the nature of the case admits of. The court however will do every thing in their power to make the parties consent, when necessary; as by putting off the trial, at the instance of the defendant, if the plaintiff will not consent<sup>o</sup>: And if the defendant refuse, the court will not give him judgment as in case of a nonsuit.

The application, in the first instance, is for a rule or summons to shew cause, upon an affidavit stating that the witness is material, and going or resident abroad: which being consented to, the court will make the rule absolute, or the judge, an order upon the summons. The interrogatories should be then prepared<sup>p</sup>, which are signed by counsel, and ought not to be too leading: this done,

a copy

<sup>n</sup> 1 Crompt. 229.

Pul. 210.

<sup>o</sup> Cowp. 174. Doug. 419.  
sed quare; and see 1 Bos. &

<sup>p</sup> Append. Chap. XXXV.  
§ 22, 3.

a copy of the interrogatories is given to the opposite attorney, with notice of the time when the witness is to be examined, in order that he may file cross interrogatories<sup>q</sup>, if he think proper. At the time appointed, the witness is taken, together with the interrogatories, to the judge's chambers, or before the commissioners appointed by the rule or order, where he is examined; and his depositions being sworn to, copies are made out, and delivered to the party requiring them. And as the depositions are only taken *de bene esse*, they cannot be made use of, if the witness should happen to be in this country, at the time of the trial<sup>r</sup>. The party succeeding is not entitled to the costs of examining witnesses on interrogatories, or taking office-copies of depositions; but each party pays his own expence, unless it be otherwise expressed in the rule<sup>s</sup>.

By the statute 13 Geo. III. c. 63. § 44. it is enacted, "that when and as often as the *East-India* company, or any person or persons, shall commence and prosecute any action or suit, in law or equity, for which cause hath arisen in *India*, against any other person or persons, in any of his majesty's courts at *Westminster*, it shall and may be lawful for such court respective-ly

<sup>q</sup> Append. Chap. XXXV. 493.; and see Bul. *Ni. Pri.* § 24. 239.

<sup>r</sup> 2 Salk. 691. 12 Mod. <sup>s</sup> 2 East, 259.



“ ly, upon motion there to be made, to provide and  
 “ award such writ or writs, in the nature of a *man-*  
 “ *damus* or commission, as therein mentioned, for  
 “ the examination of witnesses; and such examina-  
 “ tion being duly returned, shall be allowed and  
 “ read, and shall be deemed good and competent  
 “ evidence, at any trial or hearing between the par-  
 “ ties in such cause or action.” These writs have  
 been accordingly issued in several cases <sup>t</sup>; and in one  
 of them <sup>u</sup>, the motion being made on the last day of  
 the term, the court awarded such a writ, even before  
 issue joined.

<sup>t</sup> *Mullick v. Lushington, M. Company, M. 33 Geo. III.*  
 26 G. III. *East-India Com-*      <sup>u</sup> *Spalding v. Mure, T. 35*  
*pany v. Lord Malden, E. 32*      G. III.  
 G. III. *Taylor v. East-India*

## CHAPTER XXXVI.

*Of* ARBITRATION.

THE record of *nisi prius* being made up and passed, the jury-process sued out, and the witnesses *subpœna'd*, the cause is entered for trial. And in this stage of the proceedings, or more frequently at the trial, when one or other of the parties is commonly fearful of the event, the matter in dispute is sometimes referred to arbitration <sup>a</sup>.

*Arbitrations* are of two kinds, first, where there is a cause depending in court, and secondly, where no cause is depending. The submission, in the former case, is either by *rule* of court before the trial, or by order of *nisi prius* at the trial <sup>b</sup>, which is afterwards made a rule of court; and upon a submission of this kind, the plaintiff usually takes a verdict for his security, particularly when there is special bail, who would not otherwise be liable for the sum awarded. In the other case, the submission

<sup>a</sup> The subject of arbitration is not necessarily connected with a suit at law, as it frequently exists, where no suit is depending; being a mode of settling disputes by agreement of the parties, to refer them to the decision of one or more indifferent persons as arbitrators.

<sup>b</sup> Append. Chap. XXXVI. § 1.

sion is by *agreement* of the parties, which is either in writing, or by parol; or by the positive directions of an act of parliament, as in the case of inclosure acts.

References made by rule of court having been found to contribute much to the ease of the subject, in the determining of controversies, the parties being obliged thereby to submit to the award, under the penalty of imprisonment, it was enacted, by the statute 9 and 10 W. III. c. 15. § 1. “ that it shall  
 “ and may be lawful for all merchants and traders,  
 “ and others desiring to end any controversy, suit or  
 “ quarrel, for which there is no other remedy but by  
 “ personal action or suit in equity, by arbitration,  
 “ to agree that their *submission* of their suit to the  
 “ award or umpirage of any person or persons,  
 “ should be made a *rule* of any of his majesty’s  
 “ courts of record, which the parties shall choose,  
 “ and to insert such their agreement in their submission, or the condition of the *bond*<sup>c</sup> or promise,  
 “ whereby they oblige themselves respectively, to  
 “ submit to the award or umpirage of any person or  
 “ persons; which agreement being so made, and  
 “ inserted in their submission or promise, or condition of their respective bonds, shall or may, upon  
 “ producing an *affidavit* thereof made by the witnesses thereunto, or any one of them, in the court  
 “ of

<sup>c</sup> Append. Chap. XXXVI. § 2.

“ of which the same is agreed to be made a rule, and  
“ reading and filing the said affidavit in court, be en-  
“ tered of record in such court; and a *rule* shall  
“ thereupon be made by the said court, that the par-  
“ ties shall submit to, and finally be concluded by  
“ the arbitration or umpirage which shall be made  
“ concerning them, by the arbitrators or umpire,  
“ pursuant to such submission; and in case of dis-  
“ obedience to such arbitration or umpirage, the party  
“ neglecting or refusing to perform and execute the  
“ same, or any part thereof, shall be subject to all  
“ the penalties of contemning a rule of court, when  
“ he is a suitor or defendant in such court, and the  
“ court on motion shall issue process accordingly;  
“ which process shall not be stopped or delayed in  
“ its execution, by any order, rule, command, or  
“ process of any other court, either of law or equity,  
“ unless it shall be made appear on oath to such  
“ court, that the arbitrators or umpire misbehaved  
“ themselves, and that such award, arbitration, or  
“ umpirage was procured by corruption, or other  
“ undue means.” The intent of this act was to put  
submissions, where no cause was depending in court,  
upon the same footing with those, where there was a  
cause depending; and it is only declaratory of what  
the law was before, in the latter case <sup>d</sup>.

This

<sup>d</sup> 2 Bur. 701.

This statute is confined to the submission of disputes of a *civil* nature : Therefore the court will not make a submission to an award a rule of court, where part of the matter agreed to be referred has been made the subject of an indictment<sup>e</sup>. And a *parol* submission is not within the statute<sup>f</sup>; nor a submission in writing, unless it is agreed to be made a rule of court: But where there is such an agreement, it seems that the court will enforce the execution of a *parol* award by attachment<sup>g</sup>. A consent, in the arbitration-bond, to make the *award* a rule of court, instead of the *submission*, will it seems warrant the interposition of the court, under this act<sup>h</sup>: And where a submission was by bond, and at the end of the condition there was this clause; *And if the obligor shall consent, that this submission be made a rule of court, that then, &c.* the court on motion held these conditional words to be a sufficient indication of consent, and made the submission a rule of court<sup>i</sup>. So where the agreement, to make the submission a rule of court, was no part of the condition, but was thereunder written, and not signed; it appearing by affidavit, that the subscription was made before the execution of the bond, it was taken by the

<sup>e</sup> 8 T. R. 520.

Bos. & Pul. 444. but see 2 Str. 1178. *contra*.

<sup>f</sup> 7 T. R. 1.

<sup>g</sup> Barnes, 54.

<sup>i</sup> 1 Salk. 72. 1 Ld. Raym.

<sup>h</sup> *Powell v. Phillips*, E. 30 674. S. C.

G. III. 3 East, 603. K. B. 2



the court to be part of the condition, as an indorsement by way of defeazance is part of the deed; and the submission was made a rule of court<sup>j</sup>.

A submission to arbitration, by rule of court, of all matters in difference *between the parties in the cause*, is not confined to the subject-matter in the particular action then depending; but will extend to cross demands between the parties, though not pleaded by way of set-off; and the costs being to abide the event, will make no difference<sup>k</sup>: But a reference of all matters in difference *in the cause between the parties*, is confined solely to the matters in dispute in that particular action. A submission to an award having been made a rule of court, between *A.* and *B.* the parties on the record, which award not having been made in time, the dispute was referred to a second arbitrator, by *B.* and *C.* who were the real parties in the suit, the court would not grant an attachment against *B.* for not obeying the award made by the second arbitrator, because the reference should have been made by the parties on the record; and even if it had, there should have been another rule, to make the second submission a rule of court: And as the court had no jurisdiction in this case, they could  
not

<sup>j</sup> Barnes, 55.

<sup>k</sup> 2 T. R. 645.

not go into the merits, though *B.* consented to waive the objection <sup>1</sup>.

It was formerly holden, that a reference to arbitration was an implied stay of proceedings <sup>m</sup>. But in the beginning of queen *Anne's* time, a rule was made, that no reference whatsoever, of any cause depending in this court, should stay the proceedings; unless it was expressed, in the rule of reference, to be agreed, that all proceedings in this court should be stayed <sup>n</sup>. And it has been frequently decided, that an agreement to refer all matters in difference to arbitration, is not sufficient to oust the courts of law or equity of their jurisdiction <sup>o</sup>.

There are several ways, however, in which the power of arbitrators may be legally determined; as first, by the *death* of the parties to the submission <sup>p</sup>; secondly, by the arbitrators not making an award, within the *time* limited; thirdly, by their *disagreement*, and refusal to act or intermeddle any further, or by their appointing an umpire to act for them <sup>q</sup>; and fourthly, by the *revocation* of the parties: Respecting which it is laid down, that although a man be bound in a bond to stand to the arbitrament

<sup>1</sup> 2 T. R. 643.

<sup>m</sup> 1 Mod. 24.

<sup>n</sup> 2 Ld. Raym. 789.

<sup>o</sup> 8 T. R. 139.

<sup>p</sup> But see Barnes, 210.

<sup>q</sup> 1 Rol. Abr. 261, 2. 1 Sid. 428. 2 Saund. 129. 1 Lev. 174. 285. 302. 3 Lev. 263. 2 Vent. 113. 1 Salk. 70, 71, 72.

arbitrament of another, yet he may countermand or revoke the power of the arbitrator; for a man cannot, by his own act, make an authority, power, or warrant not countermandable, which by the law and of its own nature may be countermanded <sup>r</sup>: But by this countermand, or revocation of the power of the arbitrator, the bond is forfeited, and the obligee shall take the benefit thereof <sup>s</sup>. A matter was referred by consent at *nisi prius*, to the three foremen of the jury, and before the award was made, one of the parties served the arbitrators with a *subpœna* out of Chancery, which hindered their proceeding to make the award; the court held this to be a breach of the rule, and granted an attachment *nisi* <sup>t</sup>. So where the parties, upon a reference, consented to abide by the award, and not to bring any bill in equity, and their submission was made a rule of court, and after an award made, one of them filed a bill in Chancery against the other, the court made a rule absolute for an attachment <sup>u</sup>.

When a cause is referred at the trial, it is usual to get the witnesses sworn, before they leave the court; otherwise (if required) they must be sworn before a judge: And the order of *nisi prius* being obtained, from the clerk of *nisi prius* in *London* or *Middlesex*,

<sup>r</sup> 8 Co. 82.

<sup>t</sup> 1 Salk. 73.

<sup>s</sup> *Id. ibid.* T. Jon. 134.

<sup>u</sup> 3 Bur. 1256.

*Middlesex*, or from the judge's associate at the assizes, the arbitrator will make an appointment in writing, of a time and place for the parties and their witnesses to attend him; which appointment should be subscribed to a copy of the order of *nisi prius*, and served therewith on the defendant's attorney. And, previous to the meeting, the arbitrators should be furnished with a state of the case, and the names of the witnesses, &c. A similar mode of proceeding is to be observed, where the reference is by agreement without suit.

The arbitration then proceeds: And it has been holden that arbitrators, having power to choose an umpire, may elect one before they enter upon the examination of the matter referred to them <sup>v</sup>. When a cause is referred to three persons, and they or any two of them are empowered to make an award, an award made by two of them is good, if the third had notice of the meetings, &c.; but otherwise, such an award is bad <sup>w</sup>. If the arbitrators cannot make their award, within the time limited by the rule of court, or order of *nisi prius*, a rule may be obtained, by *consent*, for enlarging it; or where the submission is by agreement without suit, the time may be enlarged by *consent* of the parties.

<sup>v</sup> 2 T. R. 644.

<sup>w</sup> Willes, 215. Barnes, 57. S. C.

parties. But where the submission is by bond<sup>a</sup>, an agreement to enlarge the time for making an award, must contain a consent that it shall be made a rule of court; otherwise no attachment will be granted, for not performing an award made under it<sup>y</sup>. The rule, when necessary, is drawn up by the clerk of the rules, on a brief or motion-paper, signed by the counsel on both sides, and a copy of it served, with an appointment thereon; but before this rule can be obtained, a motion must be made, for making the order of *nisi prius* or agreement a rule of court.

It will next be proper to consider the *award*; and the mode of enforcing it, by the party in whose favour it is made, or of setting it aside, by the opposite party. The general requisites of an award are, that it be certain, mutual, and final<sup>z</sup>: But certainty to a common intent is sufficient<sup>a</sup>. And an award may be good in part and bad in part, provided the latter be independent of, and unconnected with the former<sup>b</sup>. Though the award be final, as to all matters referred, and decided upon by the arbitrators, yet upon a reference of all matters in difference between the parties, an award does

<sup>a</sup> *Aliter*, where the submission is by order of *nisi prius*. *trament*; *Kyd* on Award; and 1 Saund. 327 (2).

*Per Cur.* E. 41 G. III.

<sup>a</sup> 1 Bur. 274. and see 7 T.

<sup>y</sup> 8 T. R. 87.

R. 76.

<sup>z</sup> See Bac. Abr. tit. *Arbi-*

<sup>b</sup> Willes, 62. 66. 253



does not preclude the plaintiff from suing for a cause of action, existing against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred <sup>c</sup>.

Where a cause is depending, the submission is either silent with regard to *costs*, or they are directed to abide the event of the award, or else to be in the discretion of the arbitrator. The power of awarding costs is necessarily consequent to the authority conferred upon the arbitrator, of determining the cause; and the reason why, in references of this sort, a provision is frequently inserted, that the costs shall abide the event of the award, is that the arbitrator may not have it in his power to withhold costs, from the party who is in the right: But that is to be considered as the restriction of a power, which he would otherwise necessarily have, of allowing costs at his election <sup>d</sup>.

Where the costs are directed to abide the *event*, that must be taken to mean the legal event: Therefore, where an action of *trespass* was brought for pulling down the plaintiff's gates, and assaulting him, and the defendants pleaded not guilty to the whole declaration, and justified as to all the counts but one, under different rights of way; and the

<sup>c</sup> 4 T. R. 146. but see Willes, 268. 7 Mod. 349. oct. ed. S. C.

<sup>d</sup> 2 T. R. 644, 5. but see Willes, 62.

the arbitrator awarded a right of way to the defendants, different from any of those set forth, and gave five shillings damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way, negatived by the arbitrator; the court held, that the plaintiff could recover no more costs than damages, the award of the arbitrator not being tantamount to a judge's certificate, under the 22 & 23 *Car. II. c. 9.*<sup>e</sup> So where a cause is referred to arbitration, and the costs are directed to abide the event of the suit, the plaintiff is not entitled to them, if it appear by the award, that his original demand was under forty shillings, and he might have recovered it in a court of conscience<sup>f</sup>. If a cause be referred to arbitration, under an order of *nisi prius*, but a verdict be nevertheless taken for the plaintiff, for a certain sum, as a security for what shall be awarded to be paid to him, *and costs*, the arbitrator cannot award a sum to be paid to the plaintiff *without costs*; because, by the terms of the order, he was precluded from entering at all into the question concerning costs<sup>g</sup>.

Where the costs are left to the *discretion* of the arbitrator, he may either award a *gross sum* to be paid

<sup>e</sup> 3 T. R. 138.

H. 30 Geo. III.

<sup>f</sup> *Id.* 139. *Waston v. Gibson*,

<sup>g</sup> Say. Costs, 177.

paid for costs <sup>h</sup>; or he may award, that one of the parties shall pay to the other, costs *to be taxed by the master*<sup>i</sup>; or he may award costs *generally*, in which case the master shall tax them <sup>k</sup>. But he cannot award, that one of the parties shall pay to the other such costs as two persons named in the award, but not officers of the court, shall appoint; for this is an improper delegation of his authority <sup>l</sup>. If an arbitrator award costs, to be taxed by the master, such costs shall be taxed as between party and party, and not as between attorney and client <sup>m</sup>: And it is settled, that an arbitrator cannot award any other than the common costs, as between party and party, unless he be expressly authorised so to do <sup>n</sup>. Where a submission to arbitration is under an order of *nisi prius*, the arbitrator may award costs, *subsequent* to the order; but where the submission is by bond, he cannot award subsequent costs <sup>o</sup>. And if an arbitrator appointed under an order of *nisi prius*, only award costs to be taxed generally,

<sup>h</sup> Cas. *temp.* Hardw. 53.

P. 69, 70. 2 Blac. Rep. 953.

<sup>i</sup> 1 Salk. 75. 6 Mod. 195.  
S. C. 7 T. R. 77.

<sup>o</sup> Pr. Reg. C. P. 45. Barnes, 58. And if arbitrators award the defendant to pay the plaintiff his costs of suit, to be taxed by the proper officer before a particular day, it is the business of the *defendant* to have them taxed before that day.

<sup>k</sup> 2 Str. 737. Say. Rep. 240. Barnes, 56. 58. and see Hulloock on Costs, 418, 19. Willes, 62.

<sup>l</sup> Cas. *temp.* Hardw. 181.

<sup>2</sup> Str. 1025. S. C.

<sup>m</sup> Cas. *temp.* Hardw. 161.

Willes, 62.

<sup>n</sup> Cowp. 127. Cas. Pr. C.

nerally, the costs of the reference ought not to be allowed on the taxation, but merely the costs of the suit <sup>p</sup>: Neither will an award that one party shall pay to the other, the costs by him sustained in the action, include the costs of the reference <sup>q</sup>. Where the cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a *remanet* <sup>r</sup>.

The mode of enforcing an award, by the party in whose favour it is made, is by *action*, or when the submission is made a rule of court, by *attachment* <sup>s</sup>; and if a *verdict* has been taken for the plaintiff's security, by entering up *judgment* thereon, and taking out *execution*. Upon a submission being made a rule of court, it was formerly holden, that the party might proceed both by action and attachment at the same time <sup>t</sup>; but a different doctrine has been since laid down <sup>u</sup>.

Where the submission is by deed with a penalty, and the award is made within the time limited, an action of *debt* lies upon the deed, for the non-performance of the award; and that, whether the award be for the payment of money, or the performance

<sup>p</sup> Barnes, 123. 1 H. Blac. 71. 131. 144. 1 H. Blac. 223. 1 Bos. & Pul. 34. 639.

<sup>q</sup> 1 H. Blac. 223.

<sup>s</sup> 1 Salk. 83.

<sup>r</sup> 5 Bur. 2694. Say. Costs,

<sup>t</sup> *Id.* 73.

179. S. C. but see Doug.

<sup>u</sup> Andr. 299. Cas. *temph.*

437. 3 T. R. 507. 6 T. R. Hardw 106.

formance of a collateral act. But where in an arbitration-bond, a time was limited for the arbitrator to make his award, and such time was afterwards enlarged by mutual consent, it was held that no action could be maintained on the bond, to recover the penalty for not performing the award, made after the time first limited <sup>v</sup>: In such case, the plaintiff should have proceeded by action of *debt* or *assumpsit*, on the submission implied in the agreement, to enlarge the time. An action of *debt* also lies upon a submission by deed, without a penalty, or upon a submission in writing without deed, or by parol, where the award is for the payment of money; but where it is for the performance of a collateral act, the plaintiff should proceed by action of *covenant* upon the deed, or if the submission be without deed, by action of *assumpsit* <sup>w</sup>. And when matters in dispute are referred to arbitration, without bond, and the arbitrators award a certain sum to be due, it may be recovered under a count on an *insimul computassent* <sup>x</sup>. Two several tenants of a farm agreed with the succeeding tenant, to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award; the arbitrator awarded each of the two to pay a certain sum to the third; and the court held, that they were *jointly*

<sup>v</sup> 3 T. R. 592. *in notis*.

<sup>w</sup> 2 Ld. Raym. 1040.

<sup>x</sup> 1 Esp. Cas. *N. Pri.* 194.

but see *id.* 377.



*jointly* responsible for the sum awarded to be paid by each <sup>y</sup>.

Where the submission is by rule of court originally, or by order of *nisi prius* or agreement, which is afterwards made a rule of court, the party disobeying an award is not only liable to an action, but also to an attachment, as for a contempt <sup>z</sup>. And where the original award was lost, the court, on a proper affidavit, granted an attachment upon a copy of it <sup>a</sup>. But an attachment cannot be granted against a peer of the realm, or member of the house of commons, for non-payment of money pursuant to an award <sup>b</sup>. If an arbitrator award, among other things that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of court; and one party, in order to get the award out of the hands of the arbitrator, pay the whole; it seems that he may have an attachment against the other party, if he refuse to pay his moiety <sup>c</sup>.

The party having a remedy by action on the award, it is discretionary in the court, whether or not they will enforce it by attachment. And therefore, where there was a contrariety of evidence, they would not determine it upon affidavits,

<sup>y</sup> 7 T. R. 352.

<sup>z</sup> 1 Salk. 83.

<sup>a</sup> 1 Str. 526.

<sup>b</sup> 7 T. R. 171. 448. *Ante*, 170, 71.

<sup>c</sup> 1 Bos. & Pul. 93.

vits, in a summary way<sup>d</sup>. So where the defendant was a *bankrupt*, and incapable of paying the sum awarded, the court refused an attachment for non-payment of it<sup>e</sup>: And where a party was taken upon an attachment for not performing an award, after which he became bankrupt and obtained his certificate, the court ordered him to be discharged; for this was a demand for which *debt* would lie, and the act says, he shall not be arrested, *prosecuted* or impleaded for any debt due before the bankruptcy: It would therefore be hard to keep him in custody, when the duty is discharged<sup>f</sup>. A *feme-sole* having agreed to a reference, was awarded to deliver up two notes, and pay a sum of money; she married, and the husband refusing to pay, it was doubted if the court could grant an attachment, against both or either of them<sup>g</sup>.

The court will not grant an attachment against an *administrator*, for not performing a rule of court entered into by the intestate<sup>h</sup>. And a submission to arbitration by an *executor* or *administrator*, is not of itself holden to be an admission of assets; and therefore, if upon such a submission, the arbitrator simply awards a certain sum to be due from the testator

<sup>d</sup> 1 Str. 695.

<sup>g</sup> *Anon.* 1 Crompt. 270. and

<sup>e</sup> *Anon.* K. B. 1 Crompt. see 6 T. R. 161.  
270.

<sup>h</sup> Willes, 315.

<sup>f</sup> 2 Str. 1152.

tator or intestate's estate, without saying by whom it is to be paid, the executor or administrator is not personally liable to the payment of the sum awarded, nor can be attached for the non-payment of it <sup>i</sup>. But a submission to arbitration by an executor or administrator, is considered as a reference not only of the cause of action, but also of the question, whether or not he has assets: And therefore if an arbitrator, under a reference between A. and B. administrator, award that B. shall pay a certain sum as the amount of A.'s demand, B. cannot afterwards object that he had no assets; for this is equivalent to determining, as between these parties, that he had, and therefore he may be attached for non-payment <sup>k</sup>. A *foreign* attachment in *London*, if properly pleaded, is a good bar to an action on an award <sup>l</sup>, or on a bond conditioned for its performance <sup>m</sup>; but where the submission is made a rule of court, it is no answer to an attachment in this court, for non-payment of the sum awarded <sup>n</sup>.

Before any application is made for an attachment, or to set aside an award <sup>o</sup>, the submission must

<sup>i</sup> 5 T. R. 6. And *trustees*, by submitting matters to arbitration, do not make themselves personally liable. 3 Esp. Cas. *Ni. Pri.* 101.

<sup>k</sup> 7 T. R. 453. and see 1 T. R. 691.

<sup>l</sup> 1 Sid. 327.

<sup>m</sup> 1 Ld. Raym. 636. 3 Salk. 49. S. C.

<sup>n</sup> *Grant. v. Hawding*, 4 T. R. 313. *in notis.* 1 Crompt. 270.

<sup>o</sup> 2 Str. 1178.

must be made a rule of court, if not one already; which is done on an affidavit, by one of the witnesses, of the due execution of the bond, or agreement containing the submission<sup>p</sup>; and if he refuse to make it, the court will compel him<sup>q</sup>. But where a matter is referred to arbitrators, by rule of court, and they make their award, the court will compel a performance of it, as much as if the award were part of the rule; so that a new rule is needless<sup>r</sup>.

In order to proceed by attachment, there must be personal notice of the award, and a demand of the money, or other thing awarded<sup>s</sup>; which demand may be made by the party himself, or by a third person under a power of attorney. And at the time of demanding it, a copy of the rule must be served upon the opposite party, and of the master's *allocatur* thereon, if the demand be of taxed costs, and also a copy of the award, and of the power of attorney, if the demand be made by a third person<sup>t</sup>; the original rule and *allocatur*, and also the award and power of attorney, when required, being at the same time produced and shewn. After a demand and refusal, the court  
upon

<sup>p</sup> Append. Chap. XXXVI. § 3. 312. *Per* lord *Kenyon*, E. 35 G. III. 1 Bos. & Pul. 394.

<sup>q</sup> 1 Str. 1. Barnes, 58.

<sup>t</sup> *Per* lord *Kenyon*, H. 38 Geo. III.

<sup>r</sup> 1 Salk. 71.

<sup>s</sup> *Id.* 83. 12 Mod. 257.

upon an affidavit of the due execution of the award <sup>v</sup>, and power of attorney, and another of the service of a copy of the rule, and of the demand and refusal, &c. <sup>w</sup> will grant a rule for an attachment *nisi*, which they will afterwards make absolute, on an affidavit of service, if no sufficient cause be shewn to the contrary. Where a submission to an award is made a rule of court under the statute, there being no action, the affidavit upon which to apply for an attachment, for disobeying the award, need not be intitled in any cause; but the affidavits in answer must <sup>x</sup>: And if an affidavit be put into court, without any title, the court cannot take notice of it, though the adverse party is willing to waive the objection <sup>y</sup>. The affirmation of a *Quaker* has been holden not sufficient to ground an attachment, for the non-performance of award <sup>z</sup>.

Where a cause is referred at the trial, and a verdict taken for the plaintiff's security, and an award is afterwards made in his favour, the plaintiff may make his

<sup>v</sup> Append. Chap. XXXVI. *Powel v. Ward*, cited in Andr. 200. and *Taylor v. Scott*, cited in Cowp. 394. 1 T. R. 266.  
<sup>w</sup> *Id.* § 5, 6.  
<sup>x</sup> 3 T. R. 601. *Ante*, 451. and the several cases referred to by Mr. *Durnford*, in a very copious note on Willes, 292.  
<sup>y</sup> 2 T. R. 643.  
<sup>z</sup> 1 Str. 441. Willes, 291. S. P. but see the cases of *semb. contra*.



his election, either to proceed on the award, by action or attachment, or on the verdict; and in the latter case, the plaintiff is entitled to sign judgment, and take out execution for the money awarded, without first applying to the court for leave <sup>a</sup>. If in such case the award be made before the term, the defendant in the common pleas can only impeach it within the four first days of term: And personal service of the award is not necessary to warrant the issuing of execution, if the attorney of the defendant has been served with a copy of the award.\*

The mode of setting aside an award is by application to the court, founded on some objection to its legality, appearing on the face of the award itself, or from the reasons given by the arbitrators in support of it <sup>b</sup>; or else on an affidavit of some irregularity, as want of notice of the meeting <sup>c</sup>, or collusion or gross misbehaviour of the arbitrators <sup>d</sup>: And upon such an application, if made in due time, every ground of relief in equity, against an award, is equally open in this court <sup>e</sup>. The usual practice is, to oblige the party who complains of the award, to move to set it aside, unless the objections appear on the face of it; and then both rules come on together: This gives the other side an opportunity of answering the allegations, on which the objections to the award are founded. But the court on motion will not enter into the merits at large; for if they did, no person, it is said, would ever undertake to be an arbitrator <sup>f</sup>. And they

<sup>a</sup> 1 East, 401. 1 Bos. & 529.

Pul. 97. 480. 3 Bos. & Pul. 244.

but see 1 Salk. 81. Barnes, 58.

*contra*.

<sup>b</sup> 3 East, 18.

<sup>c</sup> 1 Salk. 71. but see 3 Atk.

<sup>d</sup> 3 Atk. 529. 2 Bur. 701.

<sup>e</sup> 3 Bur. 1258, 9.

<sup>f</sup> 1 Salk. 71. 1 Str. 301. 3

Atk. 529. 2 Bur. 701.

\* 3 Bos. & Pul. 244.

they will not set aside the award of an umpire, because he received evidence from the arbitrators, without examining the witnesses, unless he were required to re-examine them, before the making of his umpirage<sup>g</sup>. If an award be made on an improper stamp, and no application be made to enforce the award, the court will not set it aside<sup>h</sup>: And if an objection to the stamp be not alleged, as a ground for obtaining a rule to shew cause to set aside an award, the court will not suffer it to be relied upon afterwards, when cause is shewn<sup>i</sup>. On a motion respecting an award of commissioners, under an inclosure act, the court said: "We may punish upon this, if there be any corruption; or enforce its execution by *mandamus*: But we are not to interpret or set aside these awards, upon complaint of their obscurity<sup>k</sup>, &c."

By the statute 9 & 10 *W. III.* c. 15. § 2. "any  
 " arbitration or umpirage, procured by corruption or  
 " undue means, shall be judged and esteemed void  
 " and of none effect, and accordingly be set aside by  
 " any court of law or equity, so as complaint of such  
 " *corruption or undue practice* be made, in the court  
 " where the rule is made for submission to such  
 " arbitration or umpirage, *before the last day of the*  
 " *next*

<sup>g</sup> 4 T. R. 589. And see 1 38 G. III.

Bos. & Pul. 91. 175.

<sup>k</sup> *Over-Kellet Inclosure Act*,

<sup>h</sup> 7 T. R. 95.

H. 38 Geo. III.

<sup>i</sup> *Liddell v. Johnstone*, H.

“ *next term* after such arbitration or umpirage made “ and published to the parties<sup>1</sup>.” And where the application is to refer back an award to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him, it must be made within the same time; although the arbitrator be not charged with corruption or undue practice<sup>m</sup>. But the 9 & 10 *W. III.* c. 15. § 2. which limits the time of complaining against awards, to the last day of the next term after the award made, extends not to such as are made in pursuance of an order of *nisi prius*, but only where the submission is by obligation<sup>n</sup>.

The court will not set aside an award, though for defects appearing on the face of it, after the expiration of the time limited by the statute<sup>o</sup>: And a party cannot, in shewing cause against an attachment, impeach the award for any extrinsic matter<sup>p</sup>. But upon an application for an attachment, for non-performance of an award, it is competent to the parties to object to the award, for any illegality apparent on the face of it, although the time limited by the statute, for applying to the court to set aside the award, is expired<sup>q</sup>: The reason is, that upon a motion for an attachment,

<sup>1</sup> Cowp. 23. Barnes, 55.

Barnes, 55.

<sup>m</sup> 2 T. R. 781.

<sup>p</sup> 6 T. R. 161.

<sup>n</sup> 1 Str. 301. 2 Bur. 701.

<sup>q</sup> 7 T. R. 73. and see Barnes,

<sup>o</sup> *Per Powell*, Just. Andr. 57.

297. 1 East, 276. and see

attachment, the party would be without remedy, if the attachment were granted, notwithstanding the illegality of the award; whereas if the party were left to his remedy, by bringing his action on the award, it would be competent to the defendant to take advantage of any illegality appearing upon the face of it<sup>r</sup>. The court, we may remember, will not, on the last day of term, hear a motion for a rule *nisi* to set aside an award<sup>s</sup>; nor can counsel be heard on that day, to shew cause against such a rule, but the same must be enlarged, and made peremptory for the next ensuing term<sup>s</sup>.

<sup>r</sup> 1 East, 277, 8. *per Lawrence, J.*   <sup>s</sup> *Ante*, 452.

## CHAPTER XXXVII.

*Of TRIALS by the COUNTRY, and their INCIDENTS.*

**T**RIALS by the country are at bar, or *nisi prius*. Before the statute *Westm. 2. (13 Ed. I.) c. 30.* civil causes were tried either at the bar, before all the judges of the court, in term-time; or when of no great moment, before the justices in *Eyre*: a practice having very early obtained, of continuing the cause from term to term, in the court above, provided the justices in *Eyre* did not previously come into the county where the cause of action arose; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at *Westminster*, to that of the justices in *Eyre*<sup>a</sup>. Afterwards, when the justices in *Eyre* were superseded, by the modern justices of assize, it was enacted, by the above statute, “ that inquisitions to  
“ be taken of trespasses, pleaded before the justices  
“ of either *bench*<sup>b</sup>, shall be determined before the  
“ justices of assize, unless the trespass be so heinous,  
“ that

<sup>a</sup> 3 Blac. Com. 352.

<sup>b</sup> This statute, extending only to the courts of King’s Bench and Common Pleas, rising the judges of assize to whenever an issue is joined in the Exchequer, to be tried in the country, there is a particular commission, authorising the judges of assize to try it. *Bul. N. Pri.* 304.



“ that it requires great examination; and that inquiries of other pleas, pleaded in either bench, wherein the examination is easy, shall be also determined before them; as when the entry or seisin of any one is denied, or in case a single point is to be inquired into: But inquiries of many and weighty matters, which require great examination, shall be taken before the justices of the benches <sup>c</sup>, &c.; and when such inquests are taken, they shall be returned into the benches, and there judgment shall be given, and they shall be enrolled.” Since the making of this statute, causes in general are tried at *nisi prius*; trials at bar being only allowed in causes which require great examination <sup>c</sup>.

When the crown is immediately concerned, the Attorney-General has a right to demand a trial at bar <sup>d</sup>. In all other cases, it is entirely in the discretion of the court <sup>e</sup>, governed by the circumstances of the case <sup>f</sup>: Even if the parties consent, such a mode of trial cannot be had, without leave of the court <sup>g</sup>. The grounds on which this trial ought to be granted, are the great value of the subject-matter in question, the probable length of the inquiry, and the likelihood  
that

<sup>c</sup> 2 Salk. 648.

<sup>f</sup> 1 T. R. 367.

<sup>d</sup> 1 Str. 52. 644. 2 Str. 816.

<sup>g</sup> 2 Lil. P. R. 608. 1 Str.

1 Barnard. K. B. 88. S. C.

696.

<sup>e</sup> Say. Rep. 79.

that difficulties may arise in the course of it<sup>h</sup>. In *ejectment*, it is said, the rule has been not to allow a trial at bar, except where the yearly value of the land is one hundred pounds<sup>i</sup>; and value alone<sup>j</sup>, or the probable length of the inquiry, is not a sufficient ground for it: But difficulty must concur; and in order to obtain it upon that ground, it is not sufficient to say generally, in an affidavit, that the cause is expected to be difficult; but the particular difficulty, which is expected to arise, ought to be pointed out, that the court may judge whether it be sufficient<sup>k</sup>. And in a late instance, the court refused a trial at bar, on the mere allegation of length, and probable questions of difficulty, in a cause respecting a pedigree<sup>l</sup>.

If one of the justices of either bench, or a master in Chancery, be concerned, it is a good cause for a trial at bar, be the value what it may<sup>m</sup>: And it is said, that such trial was never denied to any officer of the court, nor hardly to any gentleman at the bar<sup>n</sup>. The plaintiff may have a trial of this nature, by the favour of the court, though he sue *in formâ pauperis*<sup>o</sup>: but where the plaintiff is poor, the

<sup>h</sup> *Per Kenyon, arg.* Doug. 437. and see 1 T. R. 363.

<sup>i</sup> 1 Barnard. K. B. 141. but see 1 Str. 479.

<sup>j</sup> 2 Salk. 648.

<sup>k</sup> Say. Rep. 79. and see 2 Lil. P. R. 604. 1 Barnard. K. B. 141.

<sup>l</sup> *Doe ex dem. Angell v. Angell*, T. 36 G. III.

<sup>m</sup> 1 Sid. 407.

<sup>n</sup> 2 Salk. 651. 6 Mod. 123. S. C. but see 2 Lil. P. R.

508.

<sup>o</sup> 12 Mod. 318.

the court will not grant it to the defendant, unless he will agree to take *nisi prius* costs, if he succeed, and if he fail, to pay bar costs <sup>p</sup>. In *London*, it is said, a cause cannot be tried at bar, by reason of the charter of the citizens, which exempts them from serving upon juries out of the city <sup>q</sup>. And where the cause of action arises in a county-*palatine*, it has been doubted whether this court can compel the inhabitants of the palatinate to attend as jurors <sup>r</sup>.

A trial at bar is never granted before issue joined <sup>s</sup>, except in ejectment; in which, as issue is very seldom joined till the term is over, it would afterwards be too late to make the application <sup>t</sup>. This sort of trial should regularly be moved for, in the term preceding that in which it is intended to be had; as in *Hilary* for *Easter*, and in *Trinity* for *Michaelmas* term <sup>u</sup>, except where lands lie in *Middlesex* <sup>v</sup>: and it is never allowed in an issuable term <sup>w</sup>,  
unless

<sup>p</sup> 2 Salk. 648. Doug. 421.

but see 2 Barnard. K. B. 146.

<sup>q</sup> 2 Lil. P. R. 607. 2 Salk.

644. But *note*, the great cause

of *Lockyer* against the *East India*

*Company* was tried at bar,

(M. 2 Geo. III.) by a special

jury of merchants of *London*.

2 Salk. 644. 1 T. R. 366. In

that case however, the jury

consented to be sworn, and

waive their privilege. 2 Wils.

136.

<sup>r</sup> Say. Rep. 47. and see 1

T. R. 363.

<sup>s</sup> 2 Lil. P. R. 238. 608. 12

Mod. 331. 1 Str. 696. 2 Bar-

nard. K. B. 125. 1 T. R. 364.

*in notis.*

<sup>t</sup> Say. Rep. 155.

<sup>u</sup> 2 Lil. P. R. 603. 611.

<sup>v</sup> 2 Salk. 649.

<sup>w</sup> Fitzgib. 267. *Per Buller*

*Just. in Coleman v. City of Lon-*

*don*, M. 21 Geo. III. But the

case of *Goodtitle ex dem. Re-*

*vett v. Braham*, (4 T. R. 497.)

was tried at bar, in *Hilary*

term, 32 G. III.

unless the crown be concerned in interest <sup>x</sup>, or under very particular and pressing circumstances <sup>y</sup>. In *Easter* term, they did not formerly allow more than ten trials at bar <sup>z</sup>; and they must have been brought on, a fortnight at least before the end of it <sup>a</sup>, to allow sufficient time for the other business of the court.

Anciently, there was no other notice given of such trial, than the rule in the office; but now it is said, there must be fifteen days notice <sup>b</sup>. The plaintiff however, as in other cases, may countermand his notice, and prevent the cause from being tried at the day appointed; after which, it cannot be brought to trial again, unless some new day be appointed by the court <sup>c</sup>: And it is said, that a second rule cannot be made for a trial at bar, between the same parties, in the same term <sup>d</sup>. Previous to giving notice, the day appointed for the trial must be entered with the clerk of the papers <sup>e</sup>; and it could not formerly have been on a *Saturday* <sup>f</sup>, or the last paper-day in term, except in the king's case <sup>g</sup>.

#### A trial

<sup>x</sup> 2 Lil. P. R. 603. R. M. 4 that now there must be the same notice of trials at bar as Ann. (c). 1 Str. 52.

<sup>y</sup> 2 Lil. P. R. 615. 1 Str. in other cases.

52. 1 Barnard. K. B. 370. <sup>c</sup> R. M. 4 Ann. (c).

<sup>z</sup> 2 Lil. P. R. 607. <sup>d</sup> Fitzgib. 267.

<sup>a</sup> *Id.* 609. <sup>e</sup> 2 Lil. P. R. 608.

<sup>b</sup> Append. Chap. XXXIV. <sup>f</sup> *Id.* 602.

§ 5. 2 Salk. 649. but see Imp. <sup>g</sup> 2 Salk. 625.

K. B. 353. where it is said,

A trial at bar is had upon the *venire facias* or *distringas*, &c. as at common law, without any clause of *nisi prius*; and it is mostly by a *special* jury of the county where the action is laid <sup>h</sup>. Six days notice at least ought to be given to the jurors before the trial <sup>i</sup>; and if a sufficient number do not attend to make a jury, the trial must be adjourned, and a *decem* or *octo tales* awarded, as at common law <sup>k</sup>; for the parties in this case cannot pray a *tales* upon the statutes <sup>l</sup>. And no writ of *alias* or *pluries distringas*, with a *tales*, for the trial of an issue at bar, shall be sued out, before the precedent writ of *distringas*, with a panel of the names of the jurors annexed, shall be delivered to the secondary of this court, to the intent that the issues forfeited by the jurors, for not appearing upon the precedent writ, may be duly estreated <sup>m</sup>. After a trial at bar, if either party be dissatisfied with the verdict, he may move for a new trial, as in other cases <sup>n</sup>.

Trials

<sup>h</sup> 2 Lil. P. R. 123. 1 Salk. 405. R. T. 8 W. III. 1 Bur. 292. but see Doug. 438. where the trial was had, by *consent*, by a jury of a different county; and in *Wales* or *Berwick* upon *Tweed*, &c. or where an impartial trial cannot be had, the jury must come from the next *English* or adjoining county.

<sup>i</sup> Say. Rep. 30.

<sup>k</sup> 5 T. R. 457, 8. 462.

<sup>l</sup> 35 Hen. VIII. c. 6. 4 & 5 Ph. & M. c. 7. 5 El. c. 25. 14 El. c. 9. 7 & 8 W. III. c. 32. § 3.

<sup>m</sup> R. H. 15 Car. II. 2 Lil. P. R. 123.

<sup>n</sup> Sty. Rep. 462. 466. 2 Ld. Raym. 1358. 1 Str. 584. S. C. 2 Str. 1105. 1 Bur. 395. S. P.



Trials at *nisi prius* are always had in the county where the venue is laid, and where the fact was, or is supposed to have been committed °; except where the venue is laid in *Wales*, or *Berwick* upon *Tweed* <sup>v</sup>, &c. or in a county where an impartial trial cannot be had, in which cases the cause shall be tried in the next *English* or *adjoining* county <sup>q</sup>.

The parties being prepared, and ready to proceed to trial, the cause is *entered* with the clerk of the papers, on a trial at bar, or with the marshal at *nisi prius*. The old rule for entering causes in *London* and *Middlesex* was, that unless they were entered with the chief-justice, two days before the sittings, upon which they were to be tried, the marshal might enter a *ne recipiatur*, at the request of the defendant or his attorney <sup>r</sup>: And this rule still holds, with regard to trials at the sittings in term. But if a cause was to be tried at the sittings after term, a *ne recipiatur* could not be entered, until after proclamation made, by order of the chief-justice, for bringing in the record: and then, if the record was not brought in, the defendant's attorney might enter a *ne recipiatur* <sup>s</sup>.

At present, the practice with regard to entering causes for trial, at the sittings after term, or assizes, stands

° 3 Bur. 1334.

p 2 Bur. 859.

q *Ante*, 673. 4.

<sup>r</sup> R. H. 15 & 16 Car. II.  
reg. 2.

<sup>s</sup> R. M. 4 Ann. (a).

stands thus: All causes to be tried at the sittings after term, must be entered, and the records delivered to the marshal, at the times following; *viz.* the causes in *Middlesex*, the first day of the sitting after term in *Middlesex*; and the causes for *London*, two days before the adjournment-day in *London*<sup>t</sup>. At the *assizes*, the writ and record are entered together<sup>u</sup>: And no writ and record of *nisi prius* shall be received, in any county in *England*, unless they shall be delivered to, and entered with the marshal, before the first sitting of the court, after the commission-day, except in the county of *York*, and there the writs and records shall be delivered to and entered with the marshal, before the first sitting of the court, on the second day after the commission-day, otherwise they shall not be received<sup>v</sup>. And both in *London* and *Middlesex*, as well as at the *assizes*, every cause shall be tried in the order in which it is entered, beginning with *remanets*, unless it shall be made out to the satisfaction of the judge, in open court, that there is reasonable cause to the contrary; who thereupon may

<sup>t</sup> R. H. 34 G. III. and see notice, M. 17 Geo. II.

<sup>u</sup> R. T. 10 & 11 Geo. II.

<sup>v</sup> R. H. 14 Geo. II. In this rule, there is an exception of the county of *Norfolk*; but by R. H. 32 G. III. that exception is taken away, and the time allowed for delivering

and entering writs and records of *nisi prius*, at the assizes for the county of *Norfolk*, or city of *Norwich*, is the same as in other counties. And for the fees payable to the marshal, for putting in the record of *nisi prius* at the assizes, see R. F. 13 Jac. I.

may make such order for the trial of the cause, so to be put off, as to him shall seem just <sup>w</sup>. Special jury causes are appointed for particular days: And in *London* and *Middlesex*, no cause can be tried by a special jury, unless the rule for such jury be drawn up, and the cause marked as a special jury, in the marshal's book of causes, before the adjournment-day after each term <sup>x</sup>.



The cause being entered, stands ready for trial, at the bar of the court, or before the judge at *nisi prius*: And previous to its coming on, a *brief* should be prepared for each party, and delivered to counsel; containing a short abstract of the pleadings, a clear statement of the case, and a proper arrangement of the proofs, with the names of the witnesses. The grand rule to be observed in drawing briefs, as it is well expressed in a late useful publication <sup>y</sup>, consists in conciseness with perspicuity.

When the cause is called on, the defendant may plead any matter of defence, arising after the *last* continuance, or as it is called in *French*, *puis darrein continuance*, or in *Latin*, *post ultimam continuationem*: and such a plea may be pleaded,

<sup>w</sup> R. H. 14 Geo. II. and  
notice, M. 17 Geo. II.

<sup>x</sup> R. T. 30 Geo. III.  
<sup>y</sup> 1 Sel. 472.

pleaded, after the jury are gone from the bar; but not after they have given their verdict <sup>z</sup>. The last continuance, previous to the sittings or assizes, is the day of the return of the *venire facias*, from whence the plea is continued, by the award of the *distringas*, to the next term, unless the chief-justice or judges of assize shall first come on the day of *nisi prius* <sup>a</sup>: And on this day, if any matter of defence has arisen after the last continuance, it may be pleaded by the defendant; as that the plaintiff has given him a release, or is a bankrupt, outlawed, or excommunicated; or that there has been an award made, on a reference after issue joined <sup>b</sup>. So it may be pleaded, that a *feme* plaintiff is married, or in *debt* by an administrator, that the plaintiff's letters of administration are revoked, *puis darrein continuance* <sup>c</sup>.

These pleas are twofold, in abatement and in bar <sup>d</sup>. If any thing happen, pending the writ, to abate it, this may be pleaded *puis darrein continuance*, though there be a plea in bar; for this only waives all pleas in abatement, that were in being at the time of the bar pleaded, and not subsequent matter:

<sup>z</sup> *Doc. pl.* 177. *Pearson v. Parkins*, H. 3 Geo. I. Bul. N<sup>o</sup>. Pri. 310.

<sup>a</sup> Bul. N<sup>o</sup>. Pri. 310. and see *Dyer*, 361. 2 *Lutw.* 1143. 1 *Blac. Rep.* 497. for the time to which the plea is continued.

<sup>b</sup> 2 *Esp. Cas.* N<sup>o</sup> Pri. 504.

<sup>c</sup> Bul. N<sup>o</sup> Pri. 309. and see *Com. Dig.* tit. *Abatement*, T. 24.

<sup>d</sup> *Gilb. C. P.* 105. *Aleyn*, 66.

matter: but though it be pleaded in abatement, yet after a former bar pleaded, it is peremptory, as well on demurrer as on trial; because after pleading in bar, the defendant has answered in chief, and therefore can never have judgment to answer over <sup>e</sup>. After a plea in bar, if the defendant plead a plea *puis darrein continuance*, this is a waiver of his bar, and no advantage shall afterwards be taken of it <sup>f</sup>.

The great requisite of these pleas is *certainty* <sup>g</sup>; and it is not good pleading to say generally, that *after the last continuance* such a thing happened, but the time and place must be precisely alleged <sup>h</sup>. The form of the plea, if at the assizes, is as follows: *And now at this day, that is to say, on &c. comes the said C. D. by S. S. his counsel, and says (if in bar) that the said A. B. ought not further to maintain this action against him the said C. D. because he says, that after the — day of — last past, from which day until the — day of — in — term next, (unless the justices of our lord the king, assigned to hold the assizes of our lord the king, in and for the county of — should first come on the — day of — at — in the said county of —,) the action aforesaid is continued, to wit, on &c. at &c. the said A. B. by his deed, dated &c. did release &c.; and so shew the particular*

<sup>e</sup> Gilb. C. P. 105. Aleyn.

66. Freem. 252.

<sup>f</sup> 1 Salk. 178.

<sup>g</sup> Yelv. 141. Cro. Jac.

261. Freem. 112. 2 Lutw.

1143. 2 Salk. 519. 2 Wils.

139.

<sup>h</sup> Bul. 17. Pri. 309.



particular matter<sup>i</sup>. In *abatement*, the plea concludes, by praying judgment *of the writ, and that the same may be quashed*<sup>j</sup>; or if the writ is abated *de facto*, by praying judgment *if the court will further proceed*<sup>k</sup>: In *bar*, the conclusion of the plea is, *that the plaintiff ought not further to maintain his action*, and not, *that the former inquest should not be taken*; because it is a substantive bar of itself, and comes in place of the former, and therefore must be pleaded to the action<sup>l</sup>.

There are likewise some pleas, which may be pleaded at *nisi prius*, that cannot properly be termed pleas *puis darrein continuance*, because the matter pleaded need not be expressly mentioned to have happened after the last continuance; as in *trespass*, that the plaintiff was outlawed for felony<sup>m</sup>: So the defendant may plead, that a *feme* plaintiff was *covert* on the day of the writ purchased; but he cannot plead, that she took *baron* pending the writ, without pleading it after the last continuance: the diversity seems to be, between such things as disprove the writ in fact, and such as disprove it in law<sup>n</sup>.

Pleas

<sup>i</sup> Bul. *Ni. Pri.* 310.

1143. Bul. *Ni. Pri.* 310. but

<sup>j</sup> Gilb. C. P. 105. 2 Lutw.

see Dyer, 361. *in marg.*

1143.

<sup>m</sup> Thel. Dig. 204.

<sup>k</sup> 3 Lev. 120. Bul. *Ni. Pri.*

<sup>n</sup> Bro. Abr. tit. *Continuance*,

311.

*pl.* 57. Bul. *Ni. Pri.* 310.

<sup>l</sup> Cro. Eliz. 49. 2 Lutw.

Pleas after the last continuance being productive of delay, are subject to the same sort of restraints as pleas in abatement: They must be verified on oath, before they are allowed<sup>o</sup>; and they cannot be amended, after the assizes are over<sup>p</sup>: There can be but one plea *puis darrein continuance*<sup>q</sup>; and such a plea cannot be pleaded after a demurrer<sup>r</sup>. But if a plea *puis darrein continuance* be filed, and verified on oath, the court cannot set it aside on motion, but are bound to receive it<sup>s</sup>.

When a plea *puis darrein continuance* is put in at the assizes, the plaintiff is not to reply to it there; for the judge has no power to accept of a replication, nor to try it, but ought to return the plea, as parcel of the record of *nisi prius*<sup>t</sup>; and if the plaintiff demur, it cannot be argued there<sup>u</sup>. Where a plea is certified on the back of the *postea*, and the plaintiff demurs, if the defendant, on the expiration of a rule given

<sup>o</sup> Freem. 252. 1 Str. 493.  
<sup>p</sup> Yelv. 181. Freem. 252.  
 Bul. *Ni. Pri.* 309.

<sup>q</sup> Bro. Abr. tit. *Continuance*,  
*pl.* 5. 41. Jenk. 160. Gilb.  
 C. P. 105.

<sup>r</sup> 1 Str. 493. cites Mo. 871.  
 1 Ld. Raym. 266. but see  
 Hob. 81. *contra*.

<sup>s</sup> 2 Wils. 137. 3 T. R. 554.  
 but see Jenk. 159. Yelv. 180.  
 and Bul. *Ni. Pri.* 309. where  
 it is said to be in the breast

of the judge, whether he will  
 accept such plea or not, that  
 is, whether he will or will not  
 proceed in the trial. And in  
 Say. Rep. 268. a plea *puis dar-*  
*rein continuance* was set aside,  
 because the matter of it arose  
*before* the last continuance.

<sup>t</sup> Yelv. 180. Cro. Jac. 261.  
 S. C. Freem. 252. 2 Mod. 307.  
 S. C.

<sup>u</sup> 2 Mod. 307.

given for him to join in demurrer, refuses to do so, the plaintiff may sign judgment <sup>v</sup>.

Previous to swearing the jury, the plaintiff may withdraw the record, and by that means prevent the cause from being tried: But otherwise the trial proceeds; and as the jury are called, they may be challenged.

*Challenges* are of two sorts; first, to the *array*; and secondly, to the *polls*. Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed, or set in order by the sheriff in his return; and they may be made upon account of partiality, or some default in the sheriff, or his under-officer who arrayed the panel <sup>w</sup>. And generally speaking, the same reasons that before awarding the *venire*, were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by an officer, of whose partiality there is any good ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array.

Challenges to the polls, *in capita*, are exceptions to particular jurors; and according to Sir  
*Edward*

<sup>v</sup> Freem. 252. Bul. N. Pri. 311.

<sup>w</sup> Cowp. 112.

*Edward Coke*<sup>x</sup>, they are of four kinds; first, *propter honoris respectum*, as if a lord of parliament be impanneled on a jury, in which case he may challenge himself, or be challenged by either party. Secondly, *propter defectum*, as if a juror be an alien born, or a slave or bondman; so if he be not resident in the county, or have not the necessary qualification of estate. All incapable persons, as infants, idiots, and persons of *non-sane* memory, are likewise excluded upon this ground <sup>y</sup>. Thirdly *propter affectum*, as that a juror is of kin to either party, within the ninth degree <sup>z</sup>; that he has been arbitrator, or declared his opinion on either side; that he has an interest in the cause <sup>a</sup>; that there is an action depending between him and the party; that he has taken money for his verdict, or even eat and drank at either party's expence; that he has formerly been a juror in the same cause; that he is the party's master, servant, tenant <sup>b</sup>, counsellor, steward, or attorney, or of the same society or corporation with him. All these are principal causes of challenge: Besides which, there are challenges to the *favour*, where the party objects only on account of some probable grounds of suspicion, as acquaintance, and the like; the validity of which must be left to the determination of  
*triers,*

<sup>x</sup> 1 Inst. 156.

<sup>a</sup> 3 Bur. 1856.

<sup>y</sup> Gilb. C. P. 95.

<sup>b</sup> Gilb. C. P. 95.

<sup>z</sup> Finch. L. 401.

*triers*, who, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triers shall try the next; and when another is found indifferent and sworn, the two triers shall be superseded, and the two first sworn on the jury shall try the rest <sup>c</sup>. Fourthly, a juror may be challenged *propter delictum*, as for a conviction of treason, felony, perjury, or conspiracy; or if, for some infamous offence, he has received judgment of the pillory, tumbrel, or the like, or to be branded, whipped or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *præmunire*, or forgery. A juror may himself be examined on his *voire dire*, with regard to such causes of challenge, as are not to his dishonour or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage <sup>d</sup>.

By the *balloting* act, we may remember, the names and additions of the jurors are to be written on pieces of parchment or paper, of equal size, and delivered to the marshal, by the under-sheriff or his agent; and are to be rolled up, by the direction and care of the marshal, all as near as may be

<sup>c</sup> Co. Lit. 158.

C. P. Chap. 8. Bac. Abr. tit.

<sup>d</sup> For more of *challenges*, *Juries*, (E). 3 Blac. Com. see Co. Lit. 156, &c. Gilb. 258, &c.



be in the same manner, and put together in a box or glass, to be provided for the purpose <sup>e</sup>. And by the same act <sup>f</sup>, “ when any cause shall be brought on to  
“ be tried, some indifferent person, by direction of  
“ the court, may and shall, in open court, draw out  
“ twelve of the said parchments or papers, one after  
“ another; and if any of the persons whose names  
“ shall be so drawn, shall not appear, or be challeng-  
“ ed and set aside, then such further number, until  
“ twelve persons be drawn who shall appear, and af-  
“ ter all causes of challenge, shall be allowed as fair  
“ and indifferent; and the said twelve persons so first  
“ drawn and appearing, and approved as indifferent,  
“ their names being marked in the panel, and they  
“ being sworn, shall be the jury to try the said cause;  
“ and the names of the persons so drawn and sworn,  
“ shall be kept apart by themselves, in some other  
“ box or glass to be kept for that purpose, till such  
“ jury shall have given in their verdict, and the same  
“ is recorded, or until such jury shall, by consent of  
“ the parties, or leave of the court, be discharged;  
“ and then the same names shall be rolled up again,  
“ and returned to the former box or glass, there to  
“ be kept, with the other names remaining at that  
“ time undrawn, and so *toties quoties*, as long as any  
“ cause remains then to be tried.”

Where

<sup>e</sup> *Ante*, 724, 5.

<sup>f</sup> 3 Geo. II. c. 25. § 11.

Where a *view* is allowed in any cause, it is provided by the same statute <sup>g</sup>, that the jurors who took the view, or such of them as shall appear, shall be first sworn upon the jury to try the cause, before any drawing as aforesaid; and so many only shall be drawn, to be added to the viewers who appear, as shall, after all defaulters and challenges allowed, make up the number of twelve, to be sworn for the trial of the cause.

At common law, if a sufficient number of jurymen did not appear at the trial, or so many of them were challenged and set aside, as that the remainder would not make up a full jury, there issued a writ to the sheriff, of *undecim*, *decem*, or *octo tales*, according to the number that was deficient, in order to complete the jury <sup>h</sup>: And this is still necessary, on trials at bar <sup>i</sup>. But now, by the statute 35 *Hen. VIII. c. 6.* § 6, 7, 8. (extended to *qui tam* actions, by the 4 & 5 *Ph. & M. c. 7.*) “ the justices of assize or *nisi prius*,  
 “ upon request made by the plaintiff or defendant, are  
 “ authorized to command the sheriff, or other minister to whom the making of the return shall appertain, to name and appoint, as often as need shall require, so many of such other able persons of the  
 “ said county, then present at the said assizes or  
 “ *nisi prius*, as shall make up a full jury; which persons

<sup>g</sup> § 14.

<sup>h</sup> Gilb. C. P. 73.

<sup>i</sup> 5 T. R. 457, 8. 462.

“ sons shall be added to the former panel, and their  
 “ names annexed to the same; and that the parties  
 “ shall have their challenges to the jurors so named,  
 “ added and annexed to the said former panel, as if  
 “ they had been impanneled upon the *venire facias*;  
 “ and that the said justices shall and may proceed to  
 “ the trial of every such issue, with those persons  
 “ that were before impanneled and returned, and  
 “ with those newly added and annexed to the said  
 “ former panel, in such wise as they might or ought  
 “ to have done, if all the said jurors had been return-  
 “ ed upon the writ of *venire facias*; and that every  
 “ such trial shall be as good and effectual in the law,  
 “ to all intents and purposes, as if such trial had been  
 “ had by twelve of the jurors impanneled and re-  
 “ turned upon the writ of *venire facias*.”

The qualification of a *tales-man*, in point of estate, is only *five pounds per annum*<sup>j</sup>. And, by the 7 & 8 *W. III.* c. 32. § 3. the sheriff is directed to return such persons, to serve upon the *tales*, as shall be returned upon some other panel, and then attending the court. Hence it is usual to draw their names out of the box; though where it is desired by the gentlemen of the panel who appear, and consented to by the parties, the sheriff may return such other gentlemen as can be procured to attend<sup>k</sup>. The plaintiff may avoid a nonsuit,

<sup>j</sup> Stat. 4 & 5 *W. & M.* c. 24. § 18.      <sup>k</sup> *Bul. Nī. Pri.* 305.

nonsuit, by refusing to pray a *tales*<sup>1</sup>: And after a juror has been challenged on the principal panel, he ought not to be sworn as a *tales-man*<sup>m</sup>.

After the jury are sworn, the cause is opened, and the trial proceeds, unless the parties agree to *withdraw* a juror<sup>n</sup>; which is frequently done, at the recommendation of the judge, where it is doubtful whether the action will lie; and in such case the consequence is, that each party pays his own costs.



In the progress of the trial, either party, if there be occasion, may tender a *bill* of exceptions, or *demur* to the evidence. To understand the nature of these proceedings, it should be observed, that in the first stage of that process under which facts are ascertained, the judge decides whether the evidence offered conduces to the proof of the fact, which is to be ascertained; and there is an appeal from his judgment, by a bill of exceptions. The admissibility of the evidence being established, the question *how far* it conduces to the proof of the fact which is to be ascertained, is not for the judge to decide, but for the jury exclusively; with which the judges interfere in

<sup>1</sup> 1 Str. 707.

where a juror is withdrawn,

<sup>m</sup> *Id.* 640. 2 Ld. Raym.

see Append. Chap. XXXVII.

1410. S. C.

§ 26.

<sup>n</sup> For the form of the *postea*,

in no case, but where they have in some sort substituted themselves in the place of the jury in *attaint*, upon motions for new trials. When the jury have ascertained the fact, if a question arises whether the fact thus ascertained, maintains the issue joined between the parties, or in other words, whether the law arising upon the fact (the question of law involved in the issue depending upon the true state of the fact,) is in favour of one or other of the parties, that question is for the judge to decide. Ordinarily he declares to the jury, what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained. But if the party wishes to withdraw from the jury, the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence; and the precise operation of that demurrer is, to take from the jury, and refer to the court, the application of the law to the fact<sup>o</sup>.

A bill of *exceptions* is founded upon some objection in point of law, to the opinion and direction of the court, upon a trial at bar, or of the judge at *nisi prius*, either as to the competency of witnesses<sup>p</sup>, the admissibility of evidence<sup>q</sup>, or the legal effect  
of

<sup>o</sup> 2 H. Blac. 205, 6.

<sup>p</sup> 3 T. R. 27.

<sup>q</sup> 1 Salk. 284.



of it<sup>r</sup>, or for over-ruling a challenge, or refusing a demurrer to evidence<sup>s</sup>, &c. In these cases it is enacted, by the statute *Westm. 2. (13 Edw. I.) c. 31.* that “if the party write the exception, and pray that  
 “the justices may put their seals to it for a testimony, the justices shall put their seals; and if one  
 “will not, another shall: And if the king, on complaint made of the justices, cause the record to  
 “come before him, and the exception be not found  
 “in the roll, and the party shew the exception written, with the seal of the justice affixed, the justice  
 “shall be commanded that he appear at a certain  
 “day, to confess or deny his seal; and if the justice  
 “cannot deny his seal, judgment shall be given,  
 “according to the exception, as it may be allowed  
 “or disallowed.” This statute extends to trials at bar, as well as those at *nisi prius*; but it has been doubted, whether the statute extends to criminal cases<sup>t</sup>. If a judge allow the matter to be evidence, but not conclusive, and so refer it to the jury, no bill of exceptions will lie; as if a man produce the probate of a will, to prove the devise of a term for years, and the judge leave it to the jury; because

<sup>r</sup> T. Raym. 404. T. Jon. Show. P. C. 120. Append. 146. S. C. 1 Blac. Rep. 555. Chap. XXXVII. § 46.

3 Bur. 1693. S. C. Cowp. <sup>t</sup> See the cases referred to 161. 2 Blac. Rep. 929. S. C. in 1 Bac. Abr. 325. Willes,

<sup>s</sup> Cro. Car. 341. and see 535. Bul. *Ni. Pri.* 316.

cause though the evidence be conclusive, yet the jury may hazard an *attaint*, if they please, and the proper way had been, to have demurred to the evidence <sup>u</sup>.

The bill of exceptions must be tendered at the trial: for if the party then acquiesce, he waives it, and shall not resort back to his exception, after a verdict against him, when perhaps, if he had stood upon his exception, the other party had more evidence, and need not have put the cause on that point. The statute indeed appoints no time; but the nature and reason of the thing require, that the exception should be reduced to writing, when taken and disallowed, like a special verdict, or demurrer to evidence: not that it need be drawn up in form, but the substance must be reduced to writing, while the thing is transacting, because it is to become a record <sup>v</sup>.

The bill of exceptions is either tacked to the record, or not: If it be not tacked to the record, it is necessary to set out the whole of the proceedings, previous to the trial; but otherwise, it begins with the proceedings after issue joined <sup>w</sup>. And in either case, it goes on to state, according to the circumstances, that a witness was produced <sup>x</sup> to prove certain facts; the particular evidence offered,

<sup>u</sup> T. Raym. 404, 5. T. Jon.

146. S. C.

<sup>v</sup> 1 Salk. 283, 9.

<sup>w</sup> Bul. *Ni. Pri.* 317.

<sup>x</sup> 3 T. R. 27.

ed<sup>1</sup>, or given to the jury, in support of the whole or a part of the case; or that a challenge was made, or demurrer to evidence tendered; the allegations of counsel, respecting the competency of the witness, the admissibility of the evidence, or the legal effect of it, &c.; the opinion and direction of the court or judge thereon; the verdict of the jury; and the exception of the counsel, to the opinion given<sup>2</sup>. And where the bill of exceptions respects the legal effect of evidence, the conclusion is as follows: “ And “ inasmuch as the said several matters, so produced “ and given in evidence for the party objecting, and “ by his counsel objected and insisted on, do not appear by the record of the verdict aforesaid, the said “ counsel did then and there propose their aforesaid “ exception to the opinion of the judge, and requested him to put his seal to this bill of exceptions, “ containing the said several matters so produced “ and given in evidence for the party objecting as “ aforesaid, according to the form of the statute in “ such case made and provided; and thereupon the “ aforesaid judge, at the request of the said counsel “ for

<sup>1</sup> 1 Lutw. 984. 1 Salk. 284. *Mostyn*, XI. Stat. Tri. 187, 8.

<sup>2</sup> For precedents of bills of exceptions, as to the legal effect of the *whole* of the evidence, see Brownl. 129. *Money and others v. Leach*, Bul. N<sup>o</sup>. Pri. 317. and *Fabrigas v.* And for precedents of a bill of exceptions, as to the legal effect of evidence in support of a *particular* fact, see Brownl. 131. Append. Chap. XXXVII. § 46.

“ for the party objecting, did put his seal to this bill  
 “ of exceptions, pursuant to the aforesaid statute in  
 “ such case made and provided, on the ——— day  
 “ of ——— in the ——— year of the reign, &c.”

On tendering the bill, if the exceptions therein are truly stated, the judges ought to set their seals, in testimony that such exceptions were taken at the trial: but if the bill contain matters false, or untruly stated, or matters wherein the party was not over-ruled, the judges are not obliged to affix their seals; for that would be to command them to attest a falsity<sup>b</sup>. If the judges refuse to sign the bill of exceptions, the party grieved may have a writ, grounded upon the statute, commanding them to put their seals, *juxta formam statuti*<sup>c</sup>, &c. This writ contains a surmise of an exception taken and over-ruled, and commands the justices, that *if it be so*, they put their seals<sup>d</sup>; upon which, if it be returned *quod non ita est*, an action lies for a false return, and thereupon the surmise will be tried, and if found to be so, damages will be given; and upon such recovery, there issues a peremptory writ<sup>e</sup>.

When the bill of exceptions is sealed, the truth of the facts contained in it can never afterwards be disputed<sup>f</sup>. And judgment being entered, a writ  
 of

<sup>a</sup> Bul. *Ni. Pri.* 317.

<sup>d</sup> *Reg. Brev.* 182.

<sup>b</sup> Show. P. C. 120.

<sup>e</sup> 2 Inst. 427.

<sup>c</sup> 2 Inst. 427. Bul. *Ni. Pri.*

<sup>f</sup> Show. P. C. 120.

of error is brought, to remove the proceedings into the court above; for a bill of exceptions is only to be made use of upon a writ of error: And therefore, where a writ of error will not lie, there can be no bill of exceptions<sup>g</sup>. Upon the return of the writ of error, the judge is called upon by writ, either to confess or deny his seal<sup>h</sup>; and if he confess it, the proceedings being entered of record, the party assigns error<sup>i</sup>: If the judge deny his seal, the plaintiff in the writ of error may take issue thereupon, and prove it by witnesses<sup>k</sup>.

The judgment on the writ of error, as in other cases, is either that the former judgment be affirmed, or reversed. If it be reversed, a *venire de novo* issues; which shall be made returnable in this court, although the judgment was given in the Common Pleas<sup>l</sup>.

A *demurrer* to evidence is a proceeding, by which the judges of the court in which the action is depending, are called upon to declare what the law is, upon the facts shewn in evidence, analogous to the demurrer upon facts alleged in pleading<sup>m</sup>. The reason for demurring to evidence is, that

<sup>g</sup> 1 Salk. 284. *Rex v. Inhabitants of Preston*, Bul. Ni. Pri.

316. 1 Blac. Rep. 679. Cowp. 501. but see 2 Lev. 236.

<sup>h</sup> Rast. Ent. 293. b. 3 Bur. 1693. 1 Blac. Rep. 556. S. C.

<sup>i</sup> 2 Lutw. 905, 6.

<sup>k</sup> 2 Inst. 428.

<sup>l</sup> 3 T. R. 36.

<sup>m</sup> 2 H. Blac. 205. and see 3 Salk. 122. 4 Bac. Abr. 136.

3 Blac. Com. 572. and see Append. Chap. XXXVII. § 42, &c.



that the jury, if they please, may refuse to find a special verdict, and then the facts never appear on the record<sup>n</sup>: And the question upon a demurrer to evidence being, whether the evidence offered be sufficient to maintain the issue, the party, on such demurrer, cannot take advantage of any objection to the pleadings<sup>o</sup>. A demurrer to evidence is not allowed in the king's case; and therefore if a doubt arise, upon the effect of the evidence, the judge must direct the jury to find the matter specially<sup>p</sup>.

If a matter of *record*, or other matter in *writing*, be offered in evidence, to maintain an issue joined between the parties, all the books agree, that the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the same to join in demurrer, or waive the evidence<sup>q</sup>: And the reason given for it is, that there cannot be any variance of matter in writing<sup>r</sup>. The books also agree, that if *parol* evidence be offered, and the adverse party demur, he who offers the evidence *may* join in demurrer, if he will. But the language of the old books is very indistinct upon the question, whether the party  
offering

<sup>n</sup> *Per Buller*, Just. Doug.

134.

<sup>o</sup> *Id.* 218.

<sup>p</sup> Co. Lit. 72. 5 Co. 104.

<sup>q</sup> 2 H. Blac. 206.

<sup>r</sup> Cro. Eliz. 753. 5 Co. 104

S. C.

offering *parol* evidence shall be *obliged* to join in demurrer. In a late case<sup>s</sup>, which came before the House of Lords, it was observed, in delivering the opinion of the judges, that *parol* evidence is sometimes certain, and no more admitting of any variance, than a matter in writing; but it is also often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence in writing, to join in demurrer, applies to the first sort of *parol* evidence; but it does not apply to *parol* evidence that is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all, will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. In such cases however, if the party who demurs will admit the evidence of the fact, which evidence is loose and indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this *parol* evidence, than in a matter in writing; and in such case, the party shall be allowed to demur, and his adversary must join in demurrer. But on a demurrer to *circumstantial* evidence, unless the party demurring will

<sup>s</sup> *Gibson and Johnson v. Hunter*, 2 H. Blac. 187.

will distinctly admit upon the record, every fact and every conclusion which the evidence offered conduces to prove, it is not competent for him to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering it to join in demurrer<sup>t</sup>: though, if the party offering the evidence consent to waive the objection, and join in demurrer, every fact is to be considered by the court as admitted, which the jury could infer in his favour, from the evidence demurred to<sup>u</sup>: And the court will, if they can, give judgment upon such evidence<sup>v</sup>; but otherwise a *venire de novo* must be awarded<sup>w</sup>,

The whole operation of entering the matter upon record, and conducting a demurrer to evidence, is and ought to be under the direction and control of the court, upon a trial at bar, or of the judge at *nisi prius*<sup>x</sup>; subject however to an appeal, by a bill of exceptions, if the demurrer be refused<sup>y</sup>. And where a demurrer to evidence is admitted, it is usual for the court or judge to give orders to the associate, to take a note of the testimony; which is signed by the counsel on both sides, and the demurrer is affixed to the *postea*<sup>z</sup>. Upon a demurrer to evidence, we have  
seen,

<sup>t</sup> *Gibson and Johnson v. Hunter*, 2 H. Blac. 187. and see *Aleyn*, 18. Sty. Rep. 22. 34. S. C.

<sup>u</sup> *Doug.* 119.

<sup>v</sup> *Id. ibid.*

<sup>w</sup> 2 H. Blac. 209.

<sup>x</sup> *Id.* 208.

<sup>y</sup> *Id. ibid.* Cro. Car. 341.

<sup>z</sup> *Bul. N. Pri.* 313. and see *Append. Chap. XXXVII. § 42.*

seen, the damages may be assessed *conditionally* by the principal jury, before they are discharged; or they may be assessed by another jury, upon a writ of inquiry, after the demurrer is determined <sup>a</sup>: And it is said to be the most usual course, when there is a demurrer to evidence, to discharge the jury without further inquiry <sup>b</sup>.

The evidence being gone through, and summed up by the judge, the jury, if they think proper, may *withdraw* from the bar, to deliberate on their verdict. And they are allowed to take with them, by leave of the court, letters patent and deeds under seal, and the exemplification of witnesses in Chancery, if dead; but writings or books which are not under seal, ought not to be delivered to the jurors, without the assent of both parties <sup>c</sup>, nor any evidence but what was shewn to the court <sup>d</sup>. If the jury take with them patents, deeds, &c. without leave of the court, or writings not under seal, books, &c. which have been given in evidence, without the assent of both parties, this, however irregular, will not avoid the verdict; though they be taken by the delivery of the party  
for

<sup>a</sup> *Ante*, 517, 18. Plowd. 410. 44.

1 Ld. Raym. 60. Doug. 222. <sup>c</sup> Cro. Eliz. 411.

<sup>b</sup> Cro. Car. 143. and see <sup>d</sup> 2 Rol. Abr. 686.  
Append. Chap. XXXVII. §

for whom the verdict was given<sup>e</sup>: So though one of the jury shew a writing, which was not given in evidence, to his companions<sup>f</sup>. But if the party for whom the verdict is given, or any for him, deliver to the jury, after they are gone from the bar, a letter or other writing not given in evidence, it will avoid the verdict<sup>g</sup>: And so if they examine witnesses by themselves, who were examined before, though to the same evidence as was given in court<sup>h</sup>. But they may come back into court, to hear the evidence of a thing whereof they are in doubt<sup>i</sup>. The objection in these cases must be returned upon the *postea*, or made parcel of the record; otherwise it will not be a ground for staying judgment, or bringing a writ of error<sup>j</sup>.

When the jury have agreed, they return to the bar: but before they gave their verdict, it was formerly usual to *call* or demand the plaintiff, in order to answer the amercement, to which by the old law he was liable, in case he failed in his suit<sup>k</sup>; and it is now usual to call him, whenever he is unable to make out his case, either by reason of his not adducing evidence in support of it, or evidence arising in the proper county. The cases in which it is necessary that

<sup>e</sup> Cro. Eliz. 411. and see 2

<sup>i</sup> Rol. Abr. 676.

Salk. 645.

<sup>j</sup> Cro. Eliz. 616. and see

<sup>f</sup> Cro. Eliz. 616.

Bul. N<sup>o</sup>. Pri. 308.

<sup>g</sup> Co. Lit. 227. b.

<sup>k</sup> 3 Blac. Com. 376.

<sup>h</sup> Cro. Eliz. 411, 12.



that the evidence should arise in a particular county, are either where the action is in itself local; or made so by act of parliament, as in actions upon penal statutes, &c. or where, upon a motion to change or retain the venue, the plaintiff undertakes to give material evidence, in the county where the action was brought<sup>1</sup>. And there is this advantage attending a nonsuit; that the plaintiff, though subject to the payment of costs, may afterwards bring another action for the same cause, which he cannot do, after a verdict against him.

A nonsuit can only be at the instance of the defendant: And therefore where the cause at *nisi prius* was called on, and jury sworn, but no counsel, attornies, parties, or witnesses appeared on either side, the judge held, that the only way was to discharge the jury; for nobody has a right to demand the plaintiff, but the defendant, and the defendant not demanding him, the judge could not order him to be called<sup>m</sup>. In an action against *several* defendants, the plaintiff must be nonsuited as to all, or none of them; and therefore, if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him; but such defendant

<sup>1</sup> 2 Blac. Rep. 1039. but see  
2 T. R. 281.

<sup>m</sup> 1 Str. 267. see also 2 Str.  
1117.

dant must have a verdict, if the plaintiff fail to make out his case <sup>a</sup>.

The plaintiff in no case is compellable to be nonsuited <sup>o</sup>; and therefore, if he insist upon the matter being left to the jury, they must give in their *verdict*, which is general or special. A *general* verdict is a finding by the jury, in the terms of the issue, or issues referred to them; and it is either wholly or in part, for the plaintiff or for the defendant. If it be for the plaintiff, or for the defendant in *replevin* <sup>p</sup>, the jury should regularly assess the damages: But when the plaintiff is nonsuited on the trial of an issue, he cannot have *contingent* damages assessed for him on a demurrer <sup>q</sup>; though, when the plaintiff in *replevin* is nonsuited, the jury may assess damages for the defendant <sup>r</sup>.

*Damages* are a pecuniary compensation for an injury; and may be recovered in every *personal* action that lies at common law: But in an action for a penalty given by statute to a common informer, they are not recoverable <sup>s</sup>; nor for delay of execution, in a *scire facias* founded on the statute of *Westm.* 2. c. 45 <sup>t</sup>.

In

<sup>a</sup> 3 T. R. 662. and see 1 Bur. 358. Cowp. 483.

<sup>o</sup> 2 T. R. 281.

<sup>p</sup> If an issue be found for the defendant in *replevin*, the jury, besides damages, may find the value of the distress, and the amount of the rent in arrear, if the action was found-

ed on a distress for rent, pursuant to the statute 17 Car. II. c. 7. In other cases, the jury find only damages.

<sup>q</sup> 1 Str. 507.

<sup>r</sup> Comb. 11. 5 Mod. 76.

<sup>s</sup> 1 Rol. Abr. 574. 4 Bur. 2018. 2489.

<sup>t</sup> 3 Bur. 1791.

In actions purely *real*, no damages are recoverable<sup>u</sup>, as in a writ of right, &c.; but damages may be recovered in actions of a *mixed* nature, as in ejectment<sup>v</sup>, or in an assize, or writ of entry in nature of an assize of *novel disseisin*, against the disseisor<sup>w</sup>: And by the statute of *Gloucester*, (6 *Edw.* 1.) c. 1. damages were given in an assize, or writ of entry upon a *novel disseisin*, against the alienee, or him that was found tenant after the disseisor; and also in all cases where a man recovered by assize of *mort d'ancestor*<sup>x</sup>, or upon writs of *cosinage*, *aiel* and *be-saiel*, or against a tenant upon his own intrusion or act. By the statute *Westm.* 2. (13 *Edw.* 1.) c. 26. double damages are recoverable upon a writ of *re-disseisin*; and by the 3 & 4 *Edw.* VI. c. 3. § 4. treble damages may be recovered in an assize of *novel disseisin*, upon the statutes respecting the improvement of wastes<sup>y</sup>, &c. In a writ of *dower unde nihil habet*, the widow is entitled, by the statute of *Merton*, (20 *Hen.* III.) c. 1. to recover in damages the value of her dower, from the time of the death of

<sup>u</sup> Booth, on *real* Actions, 74. was recovered against the chief-lord.

<sup>v</sup> 3 *Blac. Com.* 200, 1.

<sup>w</sup> 2 *Inst.* 286. 10 *Co. Pil-* <sup>y</sup> See also the statutes of *fold's* case; and see 3 *Blac. Westm.* 1. 3 *Edw.* I. c. 24. *Westm.* 2. 13 *Edw.* I. c. 25.

*Com.* 187, 8.

<sup>x</sup> Damages had been before given in an assize of *mort d'ancestor*, by the statute of *Marlbridge*, 52 *Hen.* III. c. 16. in cases where the land

1 *Ric.* II. e. 9. 1 *Hen.* IV. c. 8. and 4 *Hen.* IV. c. 8. by which double or treble damages are given upon *disseisin* in particular cases.

of her husband<sup>a</sup>. In *waste*, treble damages are recoverable by the statute of *Gloucester*, (6 *Edw. I.*) c. 5. to which costs are superadded, by the 8 & 9 *W. III.* c. 11. § 3. But in an action of *waste*, on the statute of *Gloucester*, against tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the court will give the defendant leave to enter up judgment for himself<sup>a</sup>. And by the statute *Westm. 2.* (13 *Edw. I.*) c. 5. § 3. damages are given in writs of *quare impedit*, and *darrein presentment*.

In actions upon the *case*, *trespass*, *replevin*, &c. the damages at common law are *single*, and proportioned to the injury complained of; but *double* or *treble* damages are sometimes given by statute, in cases where *single* damages were before recoverable, as upon the 2 *Hen. IV.* c. 11. for wrongfully suing in the admiralty court<sup>b</sup>, upon the 8 *Hen. VI.* c. 9. for a forcible entry<sup>c</sup>, and upon the 2 & 3 *W. & M.* sess. 1. c. 5. for rescuing a distress for rent<sup>d</sup>.

In an action of *debt* for a penalty, the damages at common law are merely *nominal*<sup>e</sup>. But where  
an

<sup>a</sup> For the construction of this statute, and in what cases the widow is entitled to damages thereon, see *Co. Lit.* 32, 3.

<sup>a</sup> 2 *Bos. & Pul.* 86.

<sup>b</sup> 10 *Co.* 116. *Dyer*, 159 b. *Carth.* 297.

<sup>c</sup> *Bro. Dam. pl.* 70. 10 *Co.* 115. b. *Co. Lit.* 257. b. 2 *Inst.* 289. *Cro. Eliz.* 582.

<sup>d</sup> *Carth.* 321. 1 *Salk.* 205. 1 *Ld. Raym.* 19. 342. *Skin.* 555. *Holt*, 172. *S. C.*

<sup>e</sup> 6 *T. R.* 303. but see 2 *T. R.* 388. 7 *T. R.* 446.

an action is brought upon a bond, for the non-performance of covenants, the jury, upon the trial or a writ of inquiry, are, by virtue of the statute 8 & 9 *W. III. c. 11. § 8.* to assess not only the ordinary damages and costs of suit, but also damages for such of the breaches as the plaintiff proves; and judgment shall be entered in the common form, which shall afterwards remain as a security to the plaintiff, against future breaches. In an action on a charter-party, damages may be recovered beyond the amount of the penalty <sup>g</sup>; and where the precise sum is not the essence of the agreement, the *quantum* of damages may be assessed by the jury; but where the precise sum is fixed and agreed upon between the parties, that sum is the ascertained damage, and the jury are confined to it <sup>h</sup>.

On a declaration consisting of several counts, the jury may either assess *intire* damages, on the whole or part of the declaration, or they may assess *several* damages on the different counts <sup>i</sup>. If *intire* damages be assessed, and any one or more of the counts be bad or inconsistent, judgment may be arrested <sup>j</sup>; because it must be intended, that some part of the damages

<sup>g</sup> 1 Blac. Rep. 395. and see

<sup>i</sup> 1 Rol. Abr. 570. *pl.* 1.

3 Bur. 1345.

<sup>j</sup> Say. *Dam.* ch. 25. but see

<sup>h</sup> 4 Bur. 2225. and see 2 Bos. & Pul. 346.

the distinction taken in Willes, 443.



mages was assessed upon those counts. In order to cure this defect, if there was evidence given at the trial upon such of the counts only as are good and consistent, a general verdict may be altered, from the notes of the judge, and entered only on those counts <sup>k</sup>; but if there was any evidence, which applied to the other bad or inconsistent counts, (as for instance in an action for *words*, where some actionable words are laid, and some not actionable, in different counts <sup>l</sup>, and evidence given of both sets of words, and a general verdict,) there the *postea* cannot be amended; because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them: In such case, therefore, the only remedy is by awarding a *venire de novo* <sup>m</sup>. If the jury find a verdict for the plaintiff with one penalty generally, in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another, though the former is bad in law, and though the evidence would have warranted the verdict on any other count <sup>n</sup>.

If there be judgment by default as to part, and an issue upon other part, or in an action against several defendants, if some of them let judgment go by default, and others plead to issue, there ought to be a special *venire*, as well to try the issue  
as

<sup>k</sup> 1 Bos. & Pul. 329.

542. 6 T. R. 694.

<sup>l</sup> Willes, 443.

<sup>n</sup> 3 T. R. 448. but see 3

<sup>m</sup> Doug. 376. 722. 1 T. R. Bur. 1237. *semb. contra*.

as to inquire of the damages, *tam ad triandum quam ad inquirendum*, and the jury who try the issue shall assess the damages for the whole, or against all the defendants <sup>o</sup>. But if a declaration in *trespass* contain two counts, and the defendant plead to one, and suffer judgment by default on the other, and on the trial of the first, the plaintiff prove one act of trespass only, which is covered by the second count, he is not entitled to a verdict on the first count <sup>p</sup>. In the case of several defendants, when those who plead to issue are acquitted at the trial, the jury, in some instances, shall assess damages against the defendants who let judgment go by default, and in others not. In actions upon *contract*, as *covenant* <sup>q</sup>, *assumpsit* <sup>r</sup>, &c. the plea of one defendant, for the most part, enures to the benefit of all; for the contract being intire, the plaintiff must succeed upon it against all or none; and therefore if the plaintiff fail at the trial, upon the plea of one of the defendants, he cannot have judgment or damages against the others, who let judgment go by default: But in actions of *tort*, as *trespass*, &c. where the wrong is joint and several, the distinction seems to be this, that where the plea of one of the defendants is such, as shews the plaintiff could have no cause of action against any of them,

<sup>o</sup> 11 Co. 5. 2 Bos. and Pul. Keb. 284. S. C.

163.

<sup>r</sup> Cas. Pr. C. B. 107. Prac.

<sup>p</sup> 7 T. R. 727.

Reg. 102. S. C. 3 T. R. 662.

<sup>q</sup> 1 Lev. 63. 1 Sid. 76. 1

them, there, if this plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default<sup>s</sup>; but where the plea merely operates in discharge of the party pleading it, there it shall not operate to the benefit of the other defendants, but notwithstanding such plea be found against the plaintiff, he may have judgment and damages against the other defendants<sup>t</sup>.

If there be a *demurrer* to part, and an issue upon other part, or in an action against several defendants, if some of them demur, and others plead to issue, the jury who try the issue shall assess the damages for the whole, or against all the defendants: In this case, if the issue be tried before the demurrer<sup>is</sup> argued, the damages are said to be *contingent*<sup>u</sup>, depending upon the event of the demurrer. But where the issue, as well as the demurrer, goes to the whole cause of action, the damages shall be assessed upon the issue, and not upon the demurrer.

Where there are several defendants, who sever in pleading, the jury who try the first issue shall assess damages against all, with a *cesset executio*; and the other defendants, if found guilty, shall be contributory

<sup>s</sup> 2 Ld. Raym. 1372. 1 Str.    <sup>t</sup> 2 Str. 1108. 1222.

610. 8 Mod. 217. S. C.

<sup>u</sup> *Ante*, 671.

butory to those damages <sup>v</sup>. In *trespass* against several defendants, who join in pleading, if the jury on the trial find them all jointly guilty, they cannot assess several damages <sup>w</sup>. But they may find some of them guilty, and acquit others; in which case, the damages can be assessed against those only who are found guilty: Or they may find some of the defendants guilty of the whole trespass, and others of a part only <sup>x</sup>; or some of them guilty of part, or at one time, and the rest guilty of other part, or at another time <sup>y</sup>; in either of which cases, they may assess several damages. And where in an action against several defendants, the jury by mistake have assessed several damages, the plaintiff may cure it, by entering a *nolle prosequi* as to one of the defendants, and taking judgment against the others <sup>z</sup>; or he may enter a *remittitur* as to the lesser damages <sup>a</sup>; or even without entering a *remittitur*, he may take judgment against all the defendants, for the greater damages <sup>b</sup>.

Where

<sup>v</sup> 11 Co. 5. If A. recover in *tort* against two defendants, and levy the whole damages on one of them, that one cannot recover a moiety against the other for his contribution; *aliter* in *assumpsit*. 8 T. R. 186. see 1 Str. 79. 2 Str. 1140.  
<sup>x</sup> Cro. Eliz. 860. 11 Co. 5. Sty. Rep. 5.  
<sup>y</sup> 11 Co. 6. Brownl. 233. Cro. Car. 54.  
<sup>z</sup> 11 Co. 5. Cro. Car. 239. 243. Carth. 19.  
<sup>a</sup> 11 Co. 7. a. Cro. Car. 192. 1 Wils. 30.  
<sup>b</sup> *Id. ibid.*  
<sup>w</sup> Cro. Eliz. 860. 11 Co. 5. 1 Str. 422. 2 Str. 910. 5 Bur. 2792. 6 T. R. 199. but

Where the jury, upon the trial of an issue, have omitted to assess the damages, we have before seen in what cases the omission may be supplied, by a writ of inquiry <sup>c</sup>. Where the jury give greater damages than the plaintiff has declared for, it may be cured by entering a *remittitur* of the surplus, before judgment <sup>d</sup>; or the plaintiff may amend his declaration, and have a new trial <sup>e</sup>. And in an action for a *mayhem*, the damages may be increased by the court, on view of the party <sup>f</sup>.

On a *general* verdict, if false, the jury were liable to be attainted <sup>g</sup>. To relieve them from this difficulty, it was enacted by the statute of *Westm.* 2. (13 *Edw.* 1.) c. 30. § 2. “that the justices of assize  
“shall not compel the jurors to say precisely whe-  
“ther it be disseisin or not, so as they state the  
“truth of the fact, and pray the aid of the justices;  
“but if they will say, of their own accord, that it is  
“disseisin, their verdict shall be admitted at their  
“own peril.” Upon this statute, it has become the practice for the jury, when they have any doubt as to the matter of law, to find a *special* verdict, stating the facts, and referring the law arising thereon to the decision of the court; by concluding conditionally, that if upon the whole matter alleged, the court shall be  
of

<sup>c</sup> *Ante*, 516, &c.

<sup>f</sup> 1 *Ld. Raym.* 176. 3 *Salk.*

<sup>d</sup> *Yelv.* 45. 2 *Str.* 1110.  
1171.

115. *S. C.* 1 *Wils.* 5. *Barnes*,  
153.

<sup>e</sup> *Ante*, 652, 3.

<sup>g</sup> *Gilb. C. P.* 71.



of opinion, that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant<sup>h</sup>. In finding special verdicts, where the points are single and not complicated, and no special conclusion, the counsel (if required,) are to subscribe the points in question, and agree to amend omissions or mistakes in the mesne conveyance, according to the truth, to bring the point in question to judgment<sup>i</sup>: And unnecessary finding of deeds *in hæc verba*, where the question rests not upon them, but which are only derivation of title, ought to be spared, and stated shortly, according to the substance they bear in reference to the deed, as feoffment, lease, grant<sup>i</sup>, &c. It is also a general rule, that in a special verdict, the jury must find facts, and not merely the evidence of facts<sup>j</sup>: And if in this, or any other particular, the verdict be defective, so that the court are not able to give judgment thereon, they will amend it, if possible, by the notes of counsel, or even by an affidavit of what was proved upon the trial<sup>k</sup>; or otherwise, they will supply the defect, by awarding a *venire de novo*<sup>l</sup>.

If there be a special verdict, the plaintiff's attorney generally has it drawn, from the minutes  
taken

<sup>h</sup> 3 Blac. Com. 377, 8. and S. C. 1 East, 111.

see Append. Chap. XXXVII.

<sup>k</sup> *Ante*, 662.

§ 41.

<sup>l</sup> 2 Ld. Raym. 1521. 1584.

<sup>i</sup> R. M. 1654. § 20.

<sup>2</sup> Str. 887. S. C. 1124. S. P.

<sup>j</sup> 1 Wils. 48. 2 Str. 1185. 1 East, 111.

taken at the trial, and settled by his counsel, who signs the draft. It is then delivered over to the opposite attorney, who gets his counsel to peruse and sign it; and when the verdict is thus settled and signed, it is left with the clerk of *nisi prius* in a town cause, or with the associate in the country, who makes copies for each party. The whole proceedings are then entered, docketed, and filed of record; after which a *concilium* is moved for, a rule drawn up thereon with the clerk of the rules, the cause entered with the clerk of the papers, copies of the record made and delivered to the judges, and counsel instructed and heard, in like manner as upon arguing a demurrer<sup>m</sup>; only that a special verdict must be set down in the paper for argument within four days<sup>n</sup>, and cannot be set down afterwards, without leave of the court<sup>o</sup>. After judgment given, the prevailing party is immediately entitled to tax his costs, and take out execution, without a rule for judgment; but the other party may have a rule to be present at taxing costs<sup>p</sup>.

Another method of finding a species of special verdict, is when the jury find a verdict generally for either party, but subject nevertheless to the opinion of the court above, on a *special* case, stated by the counsel on both sides, with regard to a matter of law; which has this advantage  
over

<sup>m</sup> *Ante*, 685, 6.

<sup>o</sup> Imp. K. B. 352.

<sup>n</sup> Bur. *in pref.* IV.

<sup>p</sup> *Id. ibid.*

over a special verdict, that it is attended with much less expence, and obtains a speedier decision; the *postea* being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant; as the case may happen. But as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law <sup>q</sup>.

In a special case, as in a special verdict, the facts proved at the trial ought to be stated, and not merely the evidence of facts <sup>r</sup>. It is usually dictated by the court, and signed by the counsel, before the jury are discharged; and if in settling it, any difference arises about a fact, the opinion of the jury is taken, and the fact stated accordingly <sup>s</sup>. For the argument of a special case, the same steps must be taken, as for that of a special verdict, except that it is not entered of record. But it is a rule, that all special cases to be set down by the clerk of the papers to be argued, must be entered within the four first days of the term next after the trial, at which such special cases shall have been reserved; and that such special cases shall never be set down for argument, on any of the four last days of the term <sup>t</sup>. In arguing a special

<sup>q</sup> 3 Blac. Com. 378.

<sup>r</sup> 2 Wils. 163.

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<sup>s</sup> 1 Bur. in *pref.* IV.

<sup>t</sup> R. M. 38 Geo. III.

U

cial case, the counsel are not permitted to go out of it, and the court must judge upon it as stated <sup>u</sup>: If it be mis-stated, the parties must apply to amend; or if it be so defective, that the court are not able to give judgment, they will grant a new trial, in order to have it re-stated <sup>v</sup>.

Upon trial of the issue, a case was made, and afterwards argued in court, but the fact not being sufficiently stated, so as the court could give judgment according to the justice of the cause, it was recommended to the parties, and accordingly they agreed to go to a new trial, when the plaintiff was nonsuited: and the question being about the costs, whether the master should tax the common costs of a nonsuit, or take into his consideration all the former proceedings; upon motion for the court's direction to the master, it was ordered, that he should tax the defendant his costs upon the whole, as well with relation to the first trial, as the last <sup>w</sup>. From the statement of this case, it does not appear whether, upon granting a new trial, any thing was said about the costs of the former trial, or whether they were directed to abide the event of the suit: If they were not, it seems from subsequent cases <sup>x</sup>, that at this day they would not have been allowed. But where, after the argument of a special case, the court directed a new trial, because the case was insufficiently

<sup>u</sup> 1 Bur. 617.

<sup>x</sup> 3 T. R. 507. 6 T. R. 71.

<sup>v</sup> 1 Str. 300. 3 T. R. 507. *Post.* 823, 4.

<sup>w</sup> 1 Str. 300.

sufficiently stated; and the defendant, without going to trial again, gave the plaintiff a *cognovit*; the court held, that the defendant was liable to pay the costs of the former trial <sup>y</sup>.

The verdict, whether general or special, nonsuit, &c. is entered on the back of the record of *nisi prius*; which entry, from the *latin* word it began with, is called the *postea* <sup>z</sup>. When the cause is tried at the sittings in *London* or *Middlesex*, the associate delivers the record to the attorney of the party for whom the verdict is given, and he afterwards indorses the *postea*, from the associate's minutes, on the panel; but when the cause is tried at the *assizes*, the associate keeps the record till the next term, and then delivers it, with the *postea* indorsed thereon, to the party obtaining the verdict. On a motion for a new trial, the *postea* was brought into court, and after the new trial had been denied, the *postea* could not be found; the court on debate ordered a new one to be made out, from the record above, and the associate's notes <sup>a</sup>. If the *postea* be wrong, it may be amended by the plea-roll, by the memory or notes of the judge, or by the notes of the associate or clerk of assize <sup>b</sup>. But the court will not, at a distance

<sup>y</sup> 6 T. R. 144.

<sup>z</sup> For the form of the *postea* on a verdict for the plaintiff, in *assumpsit*, *debt*, *case*, *replevin*, *trespass*, and *ejectment*, see Append. Chap. XXXVII. § 1,

&c. and for the *defendant* on a nonsuit or verdict in *assumpsit*, &c. *Id.* § 27, &c.

<sup>a</sup> 2 Str. 1264.

<sup>b</sup> *Ante*, 662.



tance of time after the trial, amend the *postea*, by increasing the damages given by the jury; although all the jurymen join in an affidavit, stating their intention to have been, to give the plaintiff such increased sum, and that they conceived the verdict they had found was calculated to give him such sum <sup>c</sup>.

<sup>c</sup> 2 T. R. 281.

CHAP-

## CHAPTER XXXVIII.

*Of New Trials; and Arrest of Judgment,  
&c.*

AFTER a general verdict, or upon a writ of inquiry, either on demurrer or judgment by default <sup>a</sup>, it is incumbent on the prevailing party to enter a rule for judgment *nisi causa*, on the *postea* or inquisition, with the clerk of the rules. This rule expires in four days <sup>b</sup> *exclusive* after it is entered; and *Sunday* <sup>c</sup>, or any other day on which the court doth not sit, is not reckoned one of the four days, unless the rule be entered on the last day of the term, or within four days after; during which four days, it is the practice to enter these rules, as of the last day of the term; and at the expiration of four days *exclusive* after entering such rule, if no sufficient cause be shewn to the contrary, judgment may be entered <sup>d</sup>. The rule for judgment ought not to be entered before the day in bank; and it is not necessary

<sup>a</sup> 1 Salk. 399.

<sup>b</sup> 3 Salk. 215. 6 Mod. 241.

<sup>c</sup> 4 Bur. 2130.

<sup>d</sup> R. E. 5 Geo. II. reg. 3. (a). The rule in the common pleas, that final judgment cannot be signed till four days

after the return of the *habeas corpora juratorum*, does not extend to a case where the term closes before the four days are expired. 2 Bos. & Pul. 393.

sary if the plaintiff be nonsuited, for in that case judgment may be entered immediately after the day in bank <sup>e</sup>.

Within the time limited by the rule, the unsuccessful party may move the court for a new trial, or inquiry; or in arrest of judgment; or for judgment *non obstante veredicto*, a repleader, or *venire facias de novo*.

The first instance to be met with in the books, of a new trial on the evidence, was in the case of *Wood and Gunston*, *A. D.* 1665 <sup>f</sup>. But *Holt*, Ch. J. seems to have been of opinion, that new trials were more ancient, from the challenge to be met with in the old books, that the juror had before given a verdict in the same cause <sup>g</sup>: Yet it does not from thence follow, that the court granted a new trial upon the evidence; for it might appear to be a mis-trial upon the record, or there might be other reasons for awarding a *venire facias de novo* <sup>h</sup>.

But whatever might have been the origin of the practice, trials by jury in civil causes could not subsist now, without a power somewhere to grant new trials. If an erroneous judgment be given in point of law, there are many ways to review and set

<sup>e</sup> R. E. 5 G. II. reg. 3.  
(a).

<sup>g</sup> 2 Salk. 648. and see 6 T. R. 622, 3.

<sup>f</sup> Sty. Rep. 462. 466.

<sup>h</sup> 2 Str. 995.

set it right. Where a court judges of facts upon depositions in writing, their sentence or decree may many ways be reviewed and set right. But a general verdict can only be set right by a new trial; which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or perhaps a certainty, that justice has not been done. The writ of *attaint* is now a mere sound in every case; in many it does not pretend to be a remedy. There are numberless causes of false verdicts, without corruption or bad intention of the jurors: They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it. The cause may be intricate: The examination may be so long, as to distract and confound their attention. Most general verdicts include legal consequences, as well as propositions of fact: In drawing these consequences, the jury may mistake, and infer directly contrary to law. The parties may be surprised, by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property; in this method of trial, would be very precarious and unsatisfactory<sup>i</sup>.

It

<sup>i</sup> 1 Bur. 393.

It was not formerly usual to grant a new trial in *ejectment*<sup>k</sup>, or after a trial at bar<sup>l</sup>, nonsuit<sup>m</sup>, or two *concurring* verdicts<sup>n</sup>; but for the sake of obtaining justice, it may be now had in these as well as in other cases<sup>o</sup>. Where there are two *contrary* verdicts, it is not of course to grant a third trial, but the court in their discretion will grant or refuse it, according to circumstances; there being no rule, either at law or in equity, which entitles the losing party in that case to the benefit of a third trial, if the second verdict be satisfactory to the court<sup>p</sup>. In an *inferior* court, a verdict cannot be set aside, and a new trial had, upon the merits, but only for irregularity<sup>q</sup>: An inferior court, however, has power to set aside a regular interlocutory judgment, in order to let in a trial of the merits.

The principal grounds or reasons for setting aside a verdict or nonsuit, and granting a new trial, are first, the want of due notice of trial<sup>s</sup>; but if the defendant appear and make defence, he shall not have

<sup>k</sup> 2 Salk. 648.

<sup>l</sup> 7 Mod. 37. 156. 2 Salk. 550. S. C.

<sup>m</sup> 1 Blac. Rep. 532.

<sup>n</sup> 6 Mod. 22. 2 Salk. 649.

<sup>o</sup> 1 Str. 692.

<sup>p</sup> 2 Str. 1105. 4 Bur. 2224. in *ejectment*; Sty. Rep. 462.

466. 1 Str. 584. 2 Ld. Raym.

1358. S. C. 2 Str. 1105. 1

Bur. 395. after a trial at bar;

<sup>q</sup> 4 Bur. 1986. 2 Blac. Rep.

698. 3 Wils. 146. 338. after a nonsuit; 4 Bur. 2109. 1 T.

R. 171. after two *concurring* verdicts.

<sup>r</sup> 2 Blac. Rep. 963.

<sup>s</sup> 2 Salk. 650. 1 Str. 113. 392. 499.

<sup>t</sup> 1 Bur. 571.

<sup>u</sup> Bul. N. Pri. 327.



have a new trial on that ground <sup>t</sup>. Secondly, for want of a proper jury; as where one of the jurymen was not returned on the *nisi prius* panel, but answered to the name of a person who was <sup>u</sup>. Thirdly, the misbehaviour of the prevailing party, towards the jury or witnesses <sup>v</sup>; but merely desiring a juror to appear, is no cause for setting aside the verdict <sup>w</sup>. Fourthly, the misbehaviour of the jury, in casting lots for their verdict <sup>x</sup>, &c: But the court will not receive an affidavit of misbehaviour from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor <sup>y</sup>; nor will they suffer the jury to explain by affidavit the grounds of their verdict, or to shew that they intended something different from what they found <sup>z</sup>. Fifthly, the court will sometimes, though rarely, grant a new trial, on account of the unavoidable absence of the attornies or witnesses <sup>a</sup>, or upon the discovery of new and material evidence, since the trial <sup>b</sup>: But a new trial is never granted for the default or omission of the parties, their counsel or attornies, in not coming prepared with, or going into evidence which they were apprised of, and might have produced at the former

<sup>t</sup> 2 Salk. 646.

Bul. *Ni. Pri.* 326.

<sup>u</sup> Willes, 484. Barnes, 453.

<sup>y</sup> Say. Rep. 100. 1 T. R. 11.

S. C. and see 4 T. R. 473.

<sup>z</sup> 5 Bur. 2667. 2 Blac. Rep.

*Ante*, 524. *Post*, 838 (a).

803. 2 T. R. 281. but see 1

<sup>v</sup> 7 Mod. 156.

Bur. 383. *scmb. contra.*

<sup>w</sup> 1 Str. 643.

<sup>a</sup> 2 Salk. 645. 6 Mod. 22.

<sup>x</sup> 2 Salk. 645. 1 Str. 642.

<sup>b</sup> 2 Blac. Rep. 955.

former trial<sup>c</sup>; or because a witness has either from inattention, or the want of being prepared, made a mistake in giving his evidence<sup>d</sup>; or on account of an objection to the competency of witnesses, discovered after the trial<sup>e</sup>. Sixthly, the misdirection of the judge is a good ground for a new trial<sup>f</sup>; or his admitting or refusing evidence contrary to law<sup>g</sup>. But it is no ground for the court to grant a new trial, that a witness called to prove a certain fact was rejected, on a supposed ground of incompetency, where another witness who was called established the same fact, which was not disputed by the other side; and the defence proceeded upon a collateral point, on which the verdict turned. 3 East, 451. Seventhly, a new trial may be, and is commonly moved for, on account of the error or mistake of the jury, in finding a verdict without, or contrary to evidence<sup>h</sup>; but where there is evidence on both sides, it is not usual to grant a new trial<sup>i</sup>, unless the evidence for the prevailing party be very slight, and the judge declare himself dissatisfied with the verdict<sup>j</sup>: And, except where a point has been saved at the trial<sup>k</sup>, it is a general rule, not to grant a new trial, except for the misdirection of the judge<sup>l</sup>, and in a penal<sup>m</sup>, hard, or

<sup>c</sup> 2 Salk. 647. 653. 6 Mod. 22. 1 Str. 691. 1 Wils. 98. 1 Blac. Rep. 298. 2 Blac. Rep. 802, 3. 1 T. R. 84. 2 T. R. 113. But the court of Common Pleas will grant a new trial, if the testimony of witnesses, on which a verdict has proceeded, be founded on and derive its credit from particular circumstances, and those circumstances be afterwards clearly falsified by affidavit. 1 Bos. & Pul. 427.

<sup>d</sup> Say Rep. 27.

<sup>e</sup> 1 T. R. 717. 1 Bos. & Pul. 429. (a).

<sup>f</sup> 2 Salk. 649. 2 Wils. 273.

<sup>g</sup> 6 Mod. 242.

<sup>h</sup> 1 Bur. 12. 54. 2 Bur. 665. 936.

<sup>i</sup> 2 Str. 1106. 1142. 1 Wils. 22. 3 Wils. 47.

<sup>j</sup> Say. Rep. 264. and see 3 Wils. 38, 9.

<sup>k</sup> 1 Bos. & Pul. 338, 9.

<sup>l</sup> 4 T. R. 753. 5 T. R. 19.

<sup>m</sup> 2 Str. 899. 1238. 1 Wils. 17. 3 Wils. 59.

or trifling action<sup>n</sup>, after a verdict for the defendant; nor after a verdict for the plaintiff, where the defence is unconscionable<sup>o</sup>, and the verdict is found according to the justice and honesty of the case<sup>p</sup>. Eighthly, a new trial may be had for *excessive* damages<sup>q</sup>; but in that case, the damages ought not to be weighed in a nice balance, but must be such as appear at first blush to be outrageous, and indicate passion or partiality in the jury. And where a new trial is granted for excessive damages, the former verdict stands as a security in the mean time, for the damages which may be given on the second trial<sup>r</sup>. It is not usual to grant a new trial for *smallness* of damages<sup>s</sup>; though inquisitions, on writs of inquiry, have been sometimes set aside on that ground<sup>t</sup>.

A new trial cannot be granted in *civil* cases, at the instance of *one* of several defendants<sup>u</sup>; nor for a  
*part*

<sup>n</sup> 2 Salk. 644. 648. 653. 1 1 Bos. & Pul. 338.

Bur. 12. 54. 664. 3 Bur. 1306.

2 Blac. Rep. 851. Cowp. 37.

And an action is considered as trifling in this respect, where the sum to be recovered is under 20*l*. *Taylor v. Green*, H. 38 G. III.

<sup>o</sup> 2 Salk. 644. 646, 7. 1 Bur. 12. 54. 2 Bur. 664. 4 T. R. 468.

<sup>p</sup> 2 Bur. 936. 2 Wils. 306. 362. 2 T. R. 4. 4 T. R. 468.

<sup>q</sup> 1 Str. 692. 1 Bur. 609. 2

Wils. 160. 205. 244. 252. 405.

3 Wils. 18. 62. 2 Blac. Rep.

929. 942. 1327. Cowp. 230. 1

T. R. 277. 4 T. R. 651. 5 T.

R. 257. 7 T. R. 529.

<sup>r</sup> 7 T. R. 529.

<sup>s</sup> 2 Salk. 647. 2 Str. 940. 1051.

<sup>t</sup> *Ante*, 524.

<sup>u</sup> 3 Salk. 361. 12 Mod. 275.

2 Str. 814.

*part* only of the cause of action<sup>v</sup>: and therefore, where one issue out of four was found against evidence, the court granted a new trial, not only as to such issue, for that they said could not be, but for the whole<sup>w</sup>. But then, the issue found against evidence must be a material one; for if, out of three issues, two are found against evidence, yet if the material issue in the cause be agreeable to evidence, the court will not grant a new trial<sup>x</sup>. In *criminal* cases, where several defendants are tried at the same time for a misdemeanor, and some are acquitted, and some convicted, the court may grant a new trial as to those convicted, if they think the conviction improper<sup>y</sup>.

The motion for a new trial must be made within four days *exclusive* after the entry of a rule for judgment<sup>z</sup>; and if it be not made within that time, the party complaining cannot afterwards be heard, on the subject of a new trial<sup>a</sup>: and there is no difference in this respect between civil and criminal cases<sup>b</sup>; though in the latter, where the court have seen of themselves, or it has appeared to them on the suggestion of counsel, that substantial justice has not been done, they have sometimes interposed

v 2 Bur. 1224. 1 Blac. Rep. 25 Geo. II. Bul. N<sup>o</sup>. Pri. 326.  
298. S. C. y 6 T. R. 619.

w *Rex v. Pool*, E. 1734. Bul. z Doug. 171.

N<sup>o</sup>. Pri. 326. a 5 T. R. 436.

x *Dexter v. Barrowby*, E. b *Id. ibid.*

posed after the regular time, and granted a new trial <sup>c</sup>. It is a general rule, that the party shall not move for a new trial, after he has moved in arrest of judgment <sup>d</sup>: This rule however extends only to cases, where the party has knowledge of the fact, at the time of moving in arrest of judgment; therefore a new trial was granted, after such a motion, on affidavits of two of the jury, that they drew lots for their verdict <sup>e</sup>. And where the defendant, pending his motion for a new trial, served the plaintiff with a copy of an allowance of a writ of error, the court held this to be an admission of the facts of the case, and refused to grant a new trial <sup>f</sup>.

An affidavit is necessary to move for a new trial, unless the ground of it appears on the face of the evidence: and the rule, if granted, is a rule, to shew cause; on obtaining which, application should be made to the judge who tried the cause, for his report of the evidence, and if he be not of the same court, his clerk will deliver it to the *puisne* judge of the court in which the action is brought. If the judge who tried the  
cause

<sup>c</sup> 2 Str. 845. 995. 2 Bur. *qu.* whether such affidavits  
1189. Doug. 171. 797. 5 T. would now be received? *Ante*,  
R. 436, 7. 1 East, 146. 817.

<sup>d</sup> 2 Salk. 647. 1 Bur. 334. <sup>f</sup> *Bennet v. Hunt*, T. 15 G.  
<sup>e</sup> Bul. *Ni. Pri.* 325, 6. but III.



cause declare himself satisfied with the verdict, it hath been usual not to grant a new trial, on account of its being against evidence: On the other hand, if he declare himself dissatisfied with the verdict, it is pretty much of course to grant it <sup>g</sup>. In a case where a judge only reported evidence, without declaring himself to be satisfied or dissatisfied with the verdict, the court were under difficulty how to act: they seemed inclined however to hear it spoken to; but through their interposition, the parties agreed to abide by the determination of the point of law <sup>h</sup>.

The granting of a new trial is either without, or upon payment of the costs of the former trial, or such costs are directed to abide the event of the suit, or nothing is said respecting them. If a new trial be granted for irregularity, the costs of the former trial ought not to be paid <sup>i</sup>; and the party applying is in such case entitled to the costs of the application. Where the plaintiff has been nonsuited, by the mistake of the judge in point of law, the court have in several instances ordered the nonsuit to be set aside, without costs <sup>j</sup>; and verdicts have been set aside in a similar manner, when they have been obtained by unfair practice <sup>k</sup>, or contrary to law

<sup>g</sup> Bul. *Ni. Pri.* 327.

<sup>j</sup> 1 Blac. Rep. 670. Say.

<sup>h</sup> *Rex v. Philips* 23 Geo.

Costs, 189. 3 Wils. 146. 338.

II. Bul. *Ni. Pri.* 327.

<sup>k</sup> 1 Bur. 352.

<sup>i</sup> 12 Mod. 370.

law and the judge's direction <sup>1</sup>: But generally speaking, where a new trial is granted for the error or mistake of the jury, either in finding a verdict without or contrary to evidence, or in giving excessive damages, it is always upon payment of the costs of the former trial <sup>m</sup>.

On granting a new trial for the misbehaviour of the jury, the costs of the former trial were directed to abide the event of the suit <sup>n</sup>. And upon setting aside a nonsuit, when the costs are directed to abide that event, though the plaintiff succeed on the second trial, he is not entitled to the costs of the first; neither is the defendant in such case entitled to the costs of the first trial: but when the same party succeeds on both trials, he is entitled to the costs of both <sup>o</sup>. Where the costs of the former trial are not ordered to be paid, nor directed to abide the event of the suit, they shall not be allowed, though the verdict has gone the same way, unless it be so expressed in the rule granting the new trial; and if the rule be silent in that respect, the costs of the first trial are never allowed,

<sup>1</sup> Say. Costs, 189. 2 Bur. 665. K. B. Pr. Reg. 408. C. 1224. 1 Blac. Rep. 298. S. B. and see 1 T. R. 20.

C. 1 Blac. Rep. 670. S. P. <sup>n</sup> 1 Str. 642. and see Willes, <sup>m</sup> 12 Mod. 370. 1 Str. 488.

642. 1 Bur. 12. 393. 2 Bur. <sup>o</sup> 8 T. R. 619. 1 East, 114 (a). S. C. cited.

allowed, whichever way the verdict may go upon the second trial <sup>p</sup>.

If the verdict or nonsuit be set aside, and a new trial granted, the rule for that purpose should be drawn up and served; and if it be on payment of costs, they must be forthwith paid, (the rule being conditional,) or the prevailing party may move the court for leave to enter up judgment, and take out execution. In order to proceed to a new trial, it is not necessary that the *nisi prius* record should be re-engrossed, unless the *postea* be indorsed on it, or that any new entries should be made or paid for; but the record must be passed again, with an alteration of the *jurata*; and notice of trial being given, another *venire* and *distringas* must be sued out and returned, and the cause set down anew <sup>q</sup>.



The only ground of *arresting judgment*, at this day, is some matter *intrinsic*, appearing upon the face

<sup>p</sup> Doug. 437. 3 T. R. 507. go the same way, the party  
6 T. R. 71. 131. 1 East, succeeding has the costs of  
111. 1 H. Blac. 639. but see both trials; but if the ver-  
1 Str. 300. 5 Bur. 2694. 6 dicts go different ways, the  
T. R. 144. In the court of party ultimately succeeding  
Common Pleas, the rule is has not the costs of the first  
different; for there, if a new trial. 1 East, 112. and see  
trial be granted, and the rule 1 H. Blac. 641.  
say nothing about costs, if <sup>q</sup> Imp. K. B. 361. and see  
the verdict on the second trial R. E., 53 G. III.

face of the record, which would render it erroneous and reversible; for though it seems to have been otherwise formerly <sup>r</sup>, yet it is now settled, that judgment cannot be arrested for *extrinsic* or foreign matter, not appearing on the face of the record, but the court are to judge upon the record itself, that their successors may know the grounds of their judgment<sup>s</sup>. The old course of taking advantage in arrest of judgment was thus: The party, after a general verdict, having a day in court, (for so he has, as to matters of law, though not of fact,) did assign his exceptions in arrest of judgment, by way of plea, and it was called pleading in arrest of judgment: This differed from moving in arrest of judgment, which was done by one as *amicus curiæ*, where the party was out of court<sup>t</sup>. After judgment on *demurrer*, there can be no motion in arrest of judgment, for any exception that might have been taken on arguing the demurrer; the reason is, that the matter of law having been already settled, by the solemn determination of the court, they will not afterwards suffer any one to come as *amicus curiæ*, and tell them that the judgment which they gave on mature deliberation is wrong: but it is otherwise after judgment by default, for that is not given in so solemn a manner<sup>u</sup>.

The

<sup>r</sup> 1 Salk. 77.

Bur. 2287.

<sup>s</sup> 1 Ld. Raym. 232. 1  
Salk. 77. S. C. *Id.* 315. 4

<sup>t</sup> 1 Salk. 77, 8. 315.  
6 Mod. 143.

<sup>u</sup> 1 Str. 425.

The parties cannot move in arrest of judgment, for any thing that is aided after verdict, at common law; or amendable at common law, or by the statutes of amendments; or cured, as matter of form, by the statutes of Jeofails.

At common law, where any thing is omitted in the declaration, thought it be matter of substance, if it be such as that without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment <sup>v</sup>. This rule however is to be understood with some limitation; for on looking into the cases, it appears to be, that where the plaintiff has stated his title or ground of action defectively or inaccurately, (because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,) it is a fair presumption, after a verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption <sup>w</sup>. And hence it is a general rule, that *a verdict will aid a title defectively*

<sup>v</sup> 2 Show. 233. T. Raym. 2 Wils. 5. 4 Bur. 2020. Cowp. 487. S. C. and see Cro. Jac. 825. 1 T. R. 141. 3 T. R. 147. 44. Hob. 78. 1 Sid. 218. Carth. 7 T. R. 518. 2 Bos. & Pul. 259. 304. 389. 1 Salk. 130. 2 Ld. 267.

Raym. 1214. 1 Wils. 1. 255. <sup>w</sup> Doug. 679.



*tively set out, but not a defective title* <sup>x</sup>; or in other words, nothing is to be presumed after verdict, but what is expressly stated in the declaration, or necessarily implied from the facts which are stated <sup>y</sup>. Thus, where the grant of a reversion was stated, which could not take effect without attornment, that, being a necessary ceremony, might be presumed to have been proved <sup>z</sup>: But where, in an action against the *indorser* of a bill of exchange, the plaintiff did not allege a demand on and refusal by the *acceptor*, when the bill became due, or that the defendant had notice of the acceptor's refusal, this omission was held to be error, and not cured by the verdict <sup>a</sup>: for in this case, it was not requisite for the plaintiff to prove, either the demand on the acceptor, or the notice to the defendant, because they were neither laid in the declaration, nor were they circumstances necessary to any of the facts charged.

Another rule at common law is, that *surplusage* will not vitiate after verdict; *utile per inutile non vitiatur* <sup>b</sup>: and therefore in *trover*, if the plaintiff declare that on the *third of March* he was possessed of goods, which came to the defendant's hands, and

<sup>x</sup> 1 Salk. 365. 2 Ld. Raym. 1225. S. C. 2 Str. 1011. 1023. Cas. temp. Hardw. 116. S. C. 1 Bur. 301. 2 Bur. 1159. 4 T. R. 472.

<sup>y</sup> *Per Buller*, Just. 1 T. R. 145. and see 7 T. R. 521.

<sup>z</sup> Doug. 683.

<sup>a</sup> *Id.* 679.

<sup>b</sup> Co. Lit. 303. b. Plowd. 232. 1 Saund. 169. 287.

and that afterwards, to wit, on the *first* of *March*, he converted them to his own use, this is cured after verdict; for “that he *afterwards* converted them” is sufficient, and the *scilicet* is void <sup>c</sup>.

As the plaintiff's action must have all the essentials necessary to maintain it, so the defendant's bar must be substantially good; and if the gist of the bar be bad, it cannot be cured by a verdict found for the defendant: but if it be found for the plaintiff, he shall have judgment, either for the badness or falsity of the bar <sup>d</sup>. Thus, before the statute for the amendment of the law <sup>e</sup>, if the defendant had pleaded payment without an acquittance, and it had been found for him, yet he could not have had judgment; because the gist of the plea was bad, since the obligation remained in force, until dissolved *eodem ligamine quo ligatur*; but if it had been found for the plaintiff, he should have had judgment <sup>f</sup>.

Where a plea confesses the action, and does not sufficiently avoid it, judgment shall be given on the confession, without regard to a verdict for the defendant, which is called a judgment *non obstante verdicto* <sup>g</sup>; and in such case, a writ of inquiry shall issue.

A ver-

<sup>c</sup> Cro. Jac. 428.

<sup>g</sup> Cro. Eliz. 241. Carth. 370.

<sup>d</sup> Gilb. C. P. 140.

<sup>1</sup> Salk. 173. S. C. 6 Mod. 1.

<sup>e</sup> 4 Ann. c. 16.

<sup>2</sup> Ld. Raym. 924. S. C. 1 Str.

<sup>f</sup> 5 Co. 43. Cro. Eliz. 455.

394. 2 Str. 873. Willes, 364.

Moor, 692. S. C. Cro. Eliz. 1 Bur. 301.

A verdict cannot help an *immaterial* issue; but an *informal* one is aided by the 32 *Hen. VIII.* c. 30<sup>b</sup>. An immaterial issue is, where that which is materially alleged by the pleadings is not traversed, but an issue taken on such a point as will not determine the merits of the cause: An informal issue is, where such allegation is not traversed in a proper manner<sup>i</sup>.

Where the issue is immaterial, the court will award a *repleader*; respecting which, the following rules were laid down by the court, in the case of *Staple and Haydon*<sup>j</sup>: First, that at common law, a repleader was allowed before trial, because a verdict did not cure an immaterial issue; but now a repleader ought never to be allowed till trial, because the fault of the issue may be helped after verdict, by the statute of Jeofails. Secondly, that if a repleader be denied where it should be granted, or granted where it should be denied, it is error. Thirdly, that the judgment of repleader is general, namely, *quod partes replacitent*; and the parties must begin again at the first fault, which occasioned the immaterial issue<sup>k</sup>: Thus, if the declaration be ill, and the bar and replication are also ill, the parties must begin *de novo*; but if the bar be good, and the replication ill,

<sup>b</sup> Gilb. C. P. 147.

1. 2 Ld. Raym. 922. 3 Salk.

<sup>i</sup> Cro. Eliz. 227. Carth. 371. 121. S. C.

<sup>j</sup> Lev. 32. 2 Mod. 137.

<sup>k</sup> 1 Ld. Raym. 169.

<sup>j</sup> 2 Salk. 579. and see 6 Mod.

ill, at the replication <sup>l</sup>. Fourthly, no *costs* are allowed on either side <sup>m</sup>. Fifthly, that a repleader cannot be awarded, after a default at *nisi prius*. To which may be added, that a repleader can never be awarded after a demurrer, or writ of error, but only after issue joined <sup>n</sup>; nor where the court can give judgment on the whole record <sup>o</sup>: And it is not grantable in favour of the person who made the first fault in pleading <sup>p</sup>.

The distinction between a repleader, and a judgment *non obstante veredicto*, seems to be this: that where the plea is good in form, though not in fact, or in other words, if it contain a defective title, or ground of defence, by which it is apparent to the court, upon the defendant's own shewing, that in any way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto* <sup>q</sup>; but where the defect is not so much in the title, as in the manner of stating it, and the issue joined thereon is immaterial, so that the

<sup>l</sup> 3 Keb. 664.

<sup>m</sup> 2 Vent. 196. 6 T. R. 131.

Barnes, 125. 2 Bos. & Pul.  
376.

<sup>n</sup> 3 Salk. 306.

<sup>o</sup> Willes, 532, 3.

<sup>p</sup> 1 Ld. Raym. 170. Doug.

396. 747.

<sup>q</sup> 1 Salk. 173. 6 Mod. 1. 2  
Ld. Raym. 924. S. C. 1 Str.

394. 2 Str. 873. Willes, 364.

1 Bur. 301. Cowp. 510. Doug.  
749.

the court know not for whom to give judgment, whether for the plaintiff or defendant, there, for their own sake, they will award a repleader<sup>r</sup>: A judgment therefore *non obstante veredicto* is always upon the merits; a repleader, upon the form and manner of pleading.

A *venire facias de novo*<sup>s</sup> is grantable, in the following cases: First, where the jury are improperly chosen, or there is any irregularity in returning them<sup>t</sup>. Secondly, where they have improperly conducted themselves<sup>u</sup>. Thirdly, where they give *general* damages, upon a declaration consisting of several counts, and it afterwards appears that one or more of them is defective<sup>v</sup>. Fourthly, where the verdict, whether general or special<sup>w</sup>, is imperfect, by reason of some uncertainty or ambiguity<sup>x</sup>, or by finding less than the whole matter put in issue, or by not assessing damages<sup>y</sup>. Fifthly, by the statute 7 & 8 *W.*

## III. c. 32.

<sup>r</sup> 3 Salk. 305. 1 Ld. Raym. 391. S. C. 2 Str. 847. 994. 1 Bur. 301.

<sup>s</sup> For the difference between a *venire de novo* and a new trial, see 1 Wils. 55.

<sup>t</sup> 2 T. R. 126. *in notis*.

<sup>u</sup> *Id. ibid.*

<sup>v</sup> R. M. 1654. § 21. Doug. 377, 8. and see 1 T. R. 542. 6 T. R. 691. But the court will not arrest the judgment in an action for words in one count,

though some of them be not actionable: *secus*, where are two counts, and none of the words in one are actionable, and there is a general verdict for the plaintiff. Willes, 443.

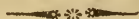
<sup>w</sup> 2 Ld. Raym. 1521. 1584. 2 Str. 887. S. C. 1124. S. P.

<sup>x</sup> Same cases; 5 Bur. 2669. 7 T. R. 52. 1 East, 111.

<sup>y</sup> 2 Str. 1052. 2 Wils. 367. 377. 2 T. R. 126. *in notis*.



c. 32. § 1. if the plaintiff, after issuing jury-process, do not proceed to trial at the first assizes: but if the jury be discharged at the assizes, in order to have a view, there is no need of a *venire de novo* <sup>z</sup>. A *venire de novo* may be granted by a court of error <sup>a</sup>; or after a demurrer to evidence <sup>b</sup>, or bill of exceptions <sup>c</sup>. And where a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial <sup>d</sup>.



The doctrine of *amendments* having been already considered, I shall next proceed to take a short review of the statutes of *Jeofails*, and the decisions thereon, as applicable to different proceedings in the course of the suit. And first, of the *original* writ.

The want of an *original* writ, we have seen <sup>e</sup>, is aided after verdict, by the 18 *Eliz.* c. 14. which statute has been extended, by an equitable construction, to the want of a *bill* upon the file <sup>f</sup>. This statute also cures the want of form, touching false

<sup>z</sup> Com. Rep. 248.

367. 2 H. Blac. 211.

<sup>a</sup> 2 Str. 1051. 1124. Cowp.

<sup>c</sup> 2 T. R. 125. 3 T. R. 36.

89. 91. Doug. 730. 1 T. R.

<sup>d</sup> 6 T. R. 131. 1 East, 111.

783. 5 T. R. 367. 2 H. Blac.

*Ante*, 755. 810, 11. 823, 24.

211. but see 2 Str. 1055. 1 T.

<sup>e</sup> *Ante*, 102.

R. 152. *scmb. contra*.

<sup>f</sup> Hob. 130. 134. 264. 281.

<sup>b</sup> Sty. Rep. 34. 335. 5 T. R. 304.

false *Latin*, or variance from the register, or other defaults in form, in any writ original or judicial, &c. By the 21 *Jac.* I. c. 13. “ judgment after verdict “ shall not be stayed or reversed, by reason of any “ variance in form only, between the original writ “ or bill, and the declaration, plaint or demand.” And by the 16 & 17 *Car.* II. c. 8. (which *Twisden* Justice used to call the *Omnipotent* act<sup>g</sup>,) “ judg- “ ment after verdict shall not be stayed or reversed, “ for want of form, or pledges returned upon the “ original writ, or because the sheriff’s name is not “ returned thereon, or for want of pledges upon any “ bill or declaration, &c.” Lastly, by the 5 *Geo.* I. c. 13. (lord *King’s* act<sup>h</sup>,) “ judgment after verdict shall “ not be stayed or reversed, for *any* defect or fault, “ either in form or substance, in any bill, writ origi- “ nal or judicial, or for any variance in such writs, “ from the declaration or other proceedings.”

Secondly, The want of a *warrant* of attorney for either party is aided, after verdict, by the 32 *Hen.* VIII. c. 30. and 18 *Eliz.* c. 14. And by the 21 *Jac.* I. c. 13. “ judgment shall not be stayed or “ reversed, for that the *plaintiff* in ejectment, or “ other personal action, being under age, appeared “ by attorney.” But if the *defendant* being under age, appears by attorney, it is still error<sup>i</sup>: Though if an attorney undertake to appear for an infant de-  
fendant,

<sup>g</sup> 1 Vent. 100. and see 7

T. R. 587.

<sup>h</sup> 3 Atk. 601.

<sup>i</sup> *Ante*, 70. Barnes, 413.

fendant, the court will oblige him to do it in a proper manner<sup>k</sup>.

Thirdly, Mistakes and omissions in the *declaration*, and other subsequent *pleadings*, are oftentimes cured by the statutes of Jeofails; which declare, “ that judgment, after verdict, shall not be stayed  
 “ or reversed, by reason of any mispleading, lack of  
 “ colour, insufficient pleading or *jeofail*, or other de-  
 “ fault or negligence of the parties, their counsellors  
 “ or attornies<sup>l</sup>; want of form in any count, declara-  
 “ tion, plaint, bill, suit, or demand<sup>m</sup>; lack of aver-  
 “ ment of any life, so as the person be proved to be  
 “ alive<sup>n</sup>; want of any *profert*, or the omission of *vi*  
 “ *et armis* or *contra pacem*, mistaking the christian  
 “ name or surname of either party, sums, day,  
 “ month or year, in any bill, declaration or pleading,  
 “ being right in any writ, plaint, roll or record pre-  
 “ ceding, or in the same roll or record wherein the  
 “ same is committed, to which the plaintiff might  
 “ have demurred, and shewn the same for cause;  
 “ want of the averment of *hoc paratus est verificare*,  
 “ or *hoc paratus est verificare per recordum*, or for  
 “ not alleging *prout patet per recordum*, or the want  
 “ of a right venue, so as the cause were tried by a  
 “ jury of the proper county, where the action is laid;  
 “ or any other matters of like nature, not being  
 “ against

<sup>k</sup> 1 Str. 114. 445.

<sup>m</sup> 18 Eliz. c. 14.

<sup>l</sup> 32 Hen. VIII. c. 30.

<sup>n</sup> 21 Jac. I. c. 13.

“ against the right of the matter of the suit, nor  
 “ whereby the issue or trial are altered °.” The last  
 of these statutes seems to extend not only to those  
 cases where there is a wrong venue in a right coun-  
 ty, but also to those where the cause has been im-  
 properly tried in a wrong county <sup>p</sup>.

Fourthly, The misjoining of the *issue* is aided by  
 the 32 Hen. VIII. c. 30. which also extends to any  
 miscontinuance or discontinuance, or misconveying  
 of process: And a discontinuance is cured by the  
 appearance of the party, in penal as well as other ac-  
 tions <sup>q</sup>. But the want of a *similiter* was formerly  
 holden not to be aided or amendable <sup>r</sup>: And where,  
 in the *similiter*, the defendant's name was put in-  
 stead of the plaintiff's, the chief-justice dismissed the  
 jury, conceiving that he had no commission to try  
 the issue <sup>s</sup>. But in a subsequent case, where a similar  
 mistake was made, the court, after trial of the issue,  
 refused to arrest the judgment <sup>t</sup>; and at length, the  
 want of a *similiter* was holden to be amendable, upon  
 three grounds; first, that it was merely an omission of  
 the clerk; secondly, that it was implied in the &c.  
 added to the last pleading; and thirdly, that by amend-  
 ing,

° 16 & 17 Car. II. c. 8.

q 6 T. R. 255.

p 7 T. R. 583. and see 1

r 1 Str. 641. 8 Mod. 376.

Ld. Raym. 330. Carth. 448. S. C.

S. C. Willes, 431. 2 East,  
 580.

s 2 Str. 1117.

t 3 Bur. 1793.

ing, the court only made that right, which the defendant himself understood to be so, by his going down to trial <sup>v</sup>.

Fifthly, With respect to the *jury*-process, it is provided by the statute 21 *Jac.* l. c. 13. “ that after verdict, judgment shall not be stayed or reversed, by reason that the *venire facias*, *habeas corpora*, or *distringas* is awarded to a wrong officer, upon any insufficient suggestion; or by reason the *visne* is in some part mis-awarded, or sued out of more places, or of fewer places, than it ought to be, so as some one place be right named; or by reason that any of the jury which tried the said issue is mis-named, either in the surname or addition, in any of the said writs, or in any return upon any of the said writs, so as upon examination it be proved to be the same man that was meant to be returned; or by reason that there is no return upon any of the said writs, so as a panel of the names of the jurors be returned and annexed to the said writ; or for that the sheriff’s name, or other officer’s name, having the return thereof, is not set to the return of any such writ, so as upon examination it be proved that the said writ was returned by the sheriff or under-sheriff, or any such other officer.”

If



If a *venire* be of the same action, and between the same parties, all other faults are amendable<sup>w</sup>. But these are incurable; and therefore in *ejectment*, if the *venire* be of a plea of trespass, omitting and *ejectment of farm*, it is ill, because not in the same action; but if the *distringas* had been right, the court would have adjudged the *venire* to be null, and the want of it is aided<sup>x</sup>. So in *scire facias* against an executor, to have execution of a judgment for damages in *trover*, it was moved in arrest of judgment, that the *venire* was in a plea of *debt*, and a new *venire* was awarded<sup>y</sup>. The statute 21 *Jac.* I. only extends to the *sur-names* and additions of the jurors; and therefore if there be a mistake in the *christian* name, it is incurable<sup>z</sup>. It is necessary, by this statute, that there should be a panel returned; therefore if the sheriff return but 23 on the *venire*, and 24 on the *distringas* or *habeas corpora*, and the twenty-fourth omitted on the *venire* appear and be sworn, the verdict will be void<sup>a</sup>. But if 12 of the 23 be sworn, and not the

<sup>w</sup> Gilb. C. P. 174.

<sup>x</sup> *Id.* 175. Bul. *Ni. Pri.* 320. but see Cro. Car. 275. 278. where a similar mistake in the *jurata* was amended, the *venire* and *distringas* being right.

<sup>y</sup> Cro. Jac. 528. Bul. *Ni. Pri.* 320.

<sup>z</sup> 5 Co. 42. Cro. Car. 202. Gilb. C. P. 177. But the court

of common pleas refused to set aside a verdict, and grant a new trial, because one of the jurors was named *Henry* in the *venire*, the *habeas corpora*, and the *postea*, his real christian name being *Harry*. Willes, 488. Barnes, 454. S. C.

<sup>a</sup> Cro. Car. 278. Gilb. C. P. 173. So a verdict has been set

the 24th, it is aided by the 18 *Eliz.* So where there were but 24 returned upon the panel annexed to the *venire facias*, and there were 48 on the *habeas corpora*, upon which the defendant made no defence; the court upon motion set aside the verdict without costs, saying, that the 21 *Jac.* I. means only the formal words upon the writ, for there must be a panel annexed to the return <sup>b</sup>.

The statutes of jeofails are extended by the statute for the amendment of the law <sup>c</sup>, to judgments entered upon confession, *nihil dicit*, or *non sum informatus*, in any court of record; and it is thereby enacted, “ that no such judgment shall be reversed, “ nor any judgment upon any writ of inquiry of damages executed thereon be stayed or reversed, for “ or by reason of any imperfection, omission, defect, “ matter or thing whatsoever, which would have “ been aided and cured by any of the said statutes of “ jeofails, in case a verdict of twelve men had been “ given in the said action or suit, so as there be an “ original writ or bill, and warrants of attorney duly “ filed according to law.” And by a subsequent act <sup>d</sup>,  
this

set aside, because one of the jurymen was not returned on the *nisi prius* panel, but answered to the name of a person who was. Willes, 484. Barnes, 453. S. C. *Ante*, 817.

<sup>b</sup> *Brown and Johnston, C. B. T. 11 Geo. II. Bul. N. Pri. 324.*

<sup>c</sup> 4 Ann. c. 16. § 2.

<sup>d</sup> 9 Ann. c. 20.

this and all the statutes of jeofails are extended to writs of *mandamus*, and informations in nature of a *quo warranto*. As there cannot however be the same intendment, in support of a judgment by default, as after a verdict, it has been holden, that the statutes of jeofails do not protect judgments by default, against objections that are cured by a verdict at common law, but such only as are remedied after a verdict by the statutes <sup>e</sup>.

The statute 32 *Hen. VIII. c. 30.* is confined to actions at common law; and in all the subsequent statutes of jeofails, there is a proviso, that they shall not extend to *criminal* proceedings, nor to any writ, bill, action, or information upon any *popular* or *penal* statute, other than such as concern the customs and subsidies of tonnage and poundage <sup>f</sup>. It has however been determined, that the statute 32 *Hen. VIII. c. 30.* extends to *penal* actions <sup>g</sup>. And by the statute 4 *Geo. II. c. 26.* which reduces the forms of legal proceedings into the *English* language, “all and every statute and statutes for the reformation and amending of the delays arising from any *jeofails*, shall and may extend to all and every form and forms, and to all proceedings in courts of justice, (except in *criminal* cases,)

<sup>e</sup> 2 Str. 933.

<sup>g</sup> 3 Lev. 375. 1 Str. 136. 2

<sup>f</sup> 16 & 17 Car. II. c. 8. and Str. 1227. Doug. 115.

see 1 Wils. 127. Cowp. 392.

cases,) when the forms and proceedings are in *English*; and all errors and mistakes are amendable and remedied thereby, in like manner as if the proceedings had been in *Latin*." And though by the 16 and 17 *Car. II.* c. 8. the several omissions, variances and defects therein mentioned, are required to be *amended* by the judges of the court where the judgment is given, or the record removed by writ of error, yet an actual amendment is never made on this statute; but the benefit of the act is attained, by the court's overlooking the exception<sup>h</sup>.

The motion in arrest of judgment, or for judgment *non obstante veredicto*, &c. may be made at any time before judgment is given<sup>i</sup>; though a new trial has been previously moved for<sup>j</sup>. But it is against the ancient course of the court, to make a rule to stay judgment, unless the *postea* be brought in; and therefore it is said, that if one move in arrest of judgment, he ought to give notice to the clerk in court on the other side; but the better way is, to give a rule upon the *postea*, for bringing it into court, and that is notice of itself<sup>k</sup>.

<sup>h</sup> 2 Str. 1011. Cas. temp.

Hardw. 314, 15.

<sup>j</sup> Doug. 745, 6.

<sup>k</sup> Salk. 78. 6 Mod. 24. S.

<sup>i</sup> 2 Str. 845. 5 T. R. 445. C. and see 5 T. R. 454, 5.

## CHAPTER XXXIX.

*Of* JUDGMENTS.

ON the expiration of the rule for judgment, if there be no previous motion for a new trial, or in arrest of judgment, &c. the prevailing party having got the *postea* stamped with a double half-crown stamp, and marked by the clerk of the *postea*<sup>a</sup>, may proceed to sign final judgment.

Judgment is the conclusion of law, upon facts found or admitted by the parties, or upon their default in the course of the suit. And it is either for the plaintiff, or for the defendant: for the former, by *nihil dicit*<sup>b</sup>, *non sum informatus*<sup>c</sup>, or confession<sup>d</sup>; for the latter, on a *non-pros*<sup>e</sup>, discontinuance<sup>f</sup>, *nolle prosequi*<sup>g</sup>, *cassetur billa vel breve*<sup>h</sup>, *retraxit*, nonsuit<sup>i</sup>, or as in case of a nonsuit<sup>i</sup>; and for either party, upon demurrer<sup>k</sup>, *nul tiel record*<sup>l</sup>,  
or

<sup>a</sup> There is an old rule of court, requiring the *postea* to be marked in two days after it comes to the attorney's hands: R. T. 2 Jac. I. reg. 2. but now, it is deemed sufficient to mark the *postea*, at any time before the costs are taxed. 1 Crompt. 277.

<sup>b</sup> Append. Chap. XXXIX. § 1, &c.

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<sup>c</sup> Append. Chap. XXXIX. § 15, 16.

<sup>d</sup> *Id.* § 17, &c.

<sup>e</sup> *Id.* § 51, &c.

<sup>f</sup> *Id.* § 65, 6.

<sup>g</sup> *Id.* § 67, 8.

<sup>h</sup> *Id.* § 69.

<sup>i</sup> *Id.* § 63, 4.

<sup>k</sup> *Id.* § 32, &c. 70.

<sup>l</sup> *Id.* § 36, 7. 71.



or verdict <sup>m</sup>. The present chapter will be principally confined to the latter judgment, on an issue in fact found by verdict; the other species of judgments having been already treated of.

In *assumpsit*, *covenant*, *case*, *replevin*, and *trespass*, the judgment for the plaintiff is, that he recover his damages <sup>n</sup> and costs against the defendant; to be levied, in an action against an executor or administrator, of the goods of the testator or intestate, in the hands of the defendant, if he hath so much thereof in his hands to be administered; and if not, then the costs to be levied *de bonis propriis* <sup>o</sup>. In *debt*, the judgment for the plaintiff is, that he recover his debt, together with his damages and costs; to be levied, in an action against an executor or administrator, of the goods of the testator or intestate, if, &c. and if not, then the damages and costs to be levied *de bonis propriis* <sup>p</sup>. In *annuity*, the judgment is, for the plaintiff to recover the annuity, and arrearages of the same, as well before the bringing of the action as afterwards, up to the time when judgment is given <sup>q</sup>.

In

<sup>m</sup> Append. Chap. XXXIX. § 38, etc. 72, &c.

<sup>n</sup> The damages in *assumpsit*, &c. are either confessed by the defendant, ascertained by the court, on a bill of exchange, &c. found by the inquisition of a sheriff's jury, on a judgment by default, or

assessed by the jury who try the issue, on a verdict.

<sup>u</sup> 4 T. R. 648. 7 T. R. 359. Append. Chap. XXXIX. § 8. 18. 42.

<sup>p</sup> Append. Chap. XXXIX. § 25. 45.

<sup>q</sup> Co. Ent. 50. Cro. Car. 436.

In *detinue*, it is for the plaintiff to recover the goods, or their value, with damages and costs <sup>r</sup>. In *replevin*, the judgment for the defendant, at common law, is to have a return of the goods <sup>s</sup>; or upon the statute 17 *Car.* II. c. 7. to recover the arrearages of rent, or value of the goods, and costs <sup>r</sup>; and in other actions, the judgment for the defendant upon a *non-pros*, nonsuit or verdict, is to recover his costs only <sup>u</sup>.

The taxing costs upon a *postea* is considered as signing final judgment: after which, execution may be immediately taken out, against the defendant's person or goods; but in order to charge him in execution, or bind his lands, or to proceed against him by action of *debt* or *scire facias* on the judgment, or against his bail on their recognisance, or if a writ of error be brought, it is necessary that the judgment should be *entered* of record, and docketed, and the judgment-roll carried to, and filed in the treasury of the court.

The judgment after verdict, &c. is entered on the issue-roll <sup>v</sup>, which from thenceforth is called the judgment-roll; and if the roll has already been carried in, which seldom happens but where the plaintiff has been ruled to enter the issue, the *postea* is taken, with the master's *allocatur*, to the treasury at *Westminster*, and the clerk of the treasury continues the proceedings,  
and

<sup>r</sup> Append. Chap. XXXIX.

§ 47.

<sup>s</sup> *Id.* 57, &c.

<sup>t</sup> *Id.* § 59, 60. 74.

<sup>u</sup> *Id.* § 51, &c.

<sup>v</sup> *Ante*, 681.

and enters the judgment. But if, as is more frequently the case, an *incipitur* only is made on the issue-roll, at the time of passing the record of *nisi prius*, the whole proceedings are to be entered, beginning with the warrants of attorney <sup>w</sup>. The proceedings are continued on the issue-roll, after the award of the *venire facias*, by the following entry: *Afterwards the process thereof is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before the lord the king at Westminster, or (by original) wheresoever, &c. until [the return of the distringas] unless, &c. [as in the jurata] according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear: At which day, before the said lord the king at Westminster, comes the said (plaintiff) by his said attorney, and the said chief justice [or justices of assize] before whom the said issue was tried, sent hither his [or their] record, had in these words, to wit, [then follows a copy of the *postea*, from the *nisi prius* record, and afterwards the final judgment <sup>x</sup>.]*

These entries were formerly made by the clerks of the chief-clerk <sup>y</sup>, who were called *entering* clerks; but

<sup>w</sup> *Ante*, 681, 2.

<sup>x</sup> Append. Chap. XXXIX.  
§ 38.

<sup>y</sup> R. M. 1654. § 14. R. T. 1 Jac. II. R. M. 5 Ann. And for the times within

which the clerks must anciently have accounted with the secondary see R. E. 15 Car. II. Reg. 3. R. H. 15 & 16 Car. II. Reg. 1. R. T.

but they are now made by the *attornies*, and ought to be written in a full fair hand, with a large margin, of an inch at least, and a convenient distance at the top, for binding up the same, and at the bottom, that the writing be not rubbed out <sup>z</sup>. In this manner, the proceedings may be entered on both sides of the roll, beginning on the back, over against the first line of the first warrant of attorney, and taking care to leave a sufficient space at the end, for the *committitur*, and entry of satisfaction, &c.

The rule with regard to bringing in rolls, is that every attorney ought to bring them into the office, fairly engrossed, by the following times, (that is to say) the rolls of *Trinity*, *Michaelmas*; and *Hilary* terms, before the essoign-day of every subsequent term, and the rolls of *Easter* term, before the first day of *Trinity* term <sup>a</sup>. And formerly, no roll could have been brought in and filed, with a *post terminum*, without leave of the court <sup>b</sup>. But in order to accommodate the attornies, the *custos brevium* now usually attends, the day but one before every term, to receive and file their rolls <sup>c</sup>. And a roll may be had of a preceding term, as a matter of course, by

<sup>z</sup> R. H. 1657. *Ante*, 681. 87. 2 Ld. Raym. 850. 6 Mod.

<sup>a</sup> R. E. 5 W. & M. M. 191.

<sup>9</sup> W. III. T. 10 W. III. M. <sup>c</sup> R. E. 9 W. III. (a). 1 Sel.  
5 Ann. 535.

<sup>b</sup> R. E. 9 W. III. 1 Salk.

by applying to the clerk of the treasury, and paying a *post terminum*; which roll may be docketed and filed, on paying some small additional fees to the officers of the court <sup>d</sup>.

At common law, the death of a *sole* plaintiff or defendant, before final judgment, would have abated the suit: but if either party *after verdict* had died in vacation, judgment might have been entered that vacation, as of the preceding term, and it would have been a good judgment at common law, as of the preceding term; though it be not so, upon the statute of frauds, in respect of purchasers, but from the *signing* <sup>e</sup>. And if either party die, after a special verdict, and pending the time taken for argument or advising thereon, or on a motion in arrest of judgment, or for a new trial, judgment may be entered, at common law, after his death, as of the term in which the *postea* was returnable, or judgment would otherwise have been given, *nunc pro tunc* <sup>f</sup>; that the delay arising from the act of the court, may not turn to the prejudice of the party.

So

<sup>d</sup> 1 East, 409.

T. R. 368. 7 T. R. 20.

<sup>e</sup> 1 Salk. 87. 3 Salk. 116.

<sup>f</sup> 1 Leon. 187. Latch, 92. 1

1 Ld. Raym. 695. 2 Ld.

Sid. 462. 1 Vent. 58. 90. S.

Raym. 766. 849. 869. 7 Mod.

C. 10 Mod. 30. 325. 1 Str.

2. 93. S. C. 3 Salk. 159. 2

427. 1 Bur. 147. 226. 4 Bur.

Salk. 401. 7 Mod. 39. S. C. 6

2277. 1 East, 409. Barnes, 255.

Mod. 191. 3 P. Wms. 399.

261.

Willes, 427. Barnes, 266. 6



So in actions against executors or administrators, if the application be made in a reasonable time, the court will give the plaintiff leave to enter up judgment, as of a preceding term, when it was signed, *nunc pro tunc* <sup>g</sup>. This however is discretionary in the court; and being a matter of indulgence, they have sometimes refused to allow it, after a considerable lapse of time, where the delay has been owing to the plaintiff or his attorney <sup>h</sup>. And in granting this indulgence, the court will take care that it shall not operate to the prejudice of the defendant, by making the plaintiff undertake not to disturb intermediate payments made by the defendant <sup>i</sup>, or impeach judgments obtained in the interval <sup>k</sup>. In an action of *debt* on judgment, the court will not give leave to enter up the judgment *nunc pro tunc*, where the proceedings were stayed pending a writ of error, and the plaintiff died before the affirmance of the judgment <sup>l</sup>. And in general it should seem, that if there be a rule for judgment, and it be not entered for many years, the court will not suffer it to be entered, without examining how it came not to be entered before <sup>m</sup>.

Where either party dies *between verdict and judgment*, it is enacted by the statute 17 Car. II. c. 8.

<sup>g</sup> 6 T. R. 6. *Baker v. Baker*, executrix, H. 35 G. III.  
<sup>h</sup> *Lloyd v. Howell*, administratrix, H. 37 G. III.

<sup>h</sup> 1 Str. 639. *Barnes*, 262.  
 see also 6 Mod. 191.

<sup>i</sup> 6 T. R. 11.

<sup>k</sup> *Lloyd v. Howell*, administratrix, H. 37 Geo. III.

<sup>l</sup> 1 T. R. 637.

<sup>m</sup> 6 Mod. 59.

c. 8. “ that his death shall not be alleged for error,  
 “ so as the judgment be entered within two terms af-  
 “ ter the verdict.” In the construction of this statute  
 it has been holden, that the death of either party be-  
 fore the assizes is not remedied; but if the party die  
 after the assizes begin, though before the trial, that  
 is within the remedy of the statute; for the assizes are  
 considered but as one day in law, and this is a reme-  
 dial act, which shall be construed favourably<sup>n</sup>. The  
 judgment upon this statute is entered by or against  
 the party, as though he were alive<sup>o</sup>; and it should be  
 entered, or at least signed<sup>p</sup>, within two terms after  
 the verdict.

By a subsequent statute<sup>q</sup>, it is enacted “ that in  
 “ all actions to be commenced in any court of re-  
 “ cord, if the plaintiff or defendant happen to  
 “ die *after interlocutory and before final judgment*,  
 “ the action shall not abate by reason thereof, if  
 “ such action might have been originally prose-  
 “ cuted or maintained, by or against the executors  
 “ or administrators of the party dying; but the  
 “ plaintiff, or if he be dead after such interlocu-  
 “ tory judgment, his executors or administrators,  
 “ shall and may have a *scire facias* against the de-  
 “ fendant,

<sup>n</sup> 1 Salk. 8. and see 2 Ld.  
 Raym. 1415. *in notis.* 7 T. R.  
 31.

<sup>o</sup> 1 Salk. 42.

<sup>p</sup> 1 Sid. 385. Barnes, 261.

<sup>q</sup> Stat. 8 & 9 W. III. c. 11.  
 § 6.

“ fendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to shew cause why damages in such action should not be assessed and recovered by him or them.” And by the same statute <sup>q</sup>, “ if there be *two or more plaintiffs or defendants*, and one or more of them die, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants.” And if the plaintiff become bankrupt, after interlocutory judgment, his assignees may proceed to final judgment <sup>r</sup> and execution<sup>s</sup>, in the bankrupt’s name, without a *scire facias*. So where the plaintiff after verdict, was discharged under an insolvent act, the court held that the assignee might make use of his name, in entering up judgment, and taking out execution <sup>t</sup>.

The judgment, by general intendment of law, has relation to the first day of the term whereof it is entered,

<sup>q</sup> § 7.

<sup>r</sup> 2 Wils. 358. 374. 378.

<sup>s</sup> 3 T. R. 437. but note, there was a *scire facias* after judgment, to warrant execution, in the cases of *Gibbins* and others v. *Mantle*, 2 Wils.

372. 378. and *Winter* and others v. *Kretchman*, 2 T. R. 45. and see 1 Mod. 93. 1 Vent. 173. S. C. 5 Mod. 58. 1 T. R. 463.

<sup>t</sup> *Abbiis* v. *Barnard*, M. 35 G. III.

entered<sup>u</sup>, unless any thing appear on the record, shewing that it cannot have that relation<sup>v</sup>; and as against the defendant and his heirs, it binds a moiety of all the *freehold* lands and tenements<sup>w</sup>, which he or any person or persons in *trust* for him<sup>x</sup>, was or were seised of, at or after the time to which the judgment relates. And a court of equity will not oblige a judgment-creditor to wait, till he is paid out of the rents; but will accelerate the payment, by directing a sale of the moiety<sup>y</sup>. Where there is a *term* attendant on the inheritance, a judgment is an equitable lien on the inheritance, and consequently affects the term<sup>z</sup>; but generally speaking, a judgment does not bind *leasehold* property, which is affected only by the writ of execution<sup>a</sup>, and, as against purchasers, by the delivery of it to the sheriff<sup>b</sup>.

As to *freehold* lands, they are bound at common law, from the time of the judgment, so that execution may be had of these, though the party aliene *bonâ fide* before execution sued out. Therefore

<sup>u</sup> 3 Salk. 212. 1 Wils. 39. the lien created by it. 1 Salk. 7 T. R. 2. In actions by original, the judgment seems to relate to the *essoins*-day; in actions by *bill*, to the first day in full term. See 1 Sel. 8. and the cases there cited.

<sup>v</sup> 3 Bur. 1596.

<sup>w</sup> Stat. Westm. 2. (13 Ed. I.) c. 18. And bringing *debt* on a judgment is no waiver of

80.

<sup>x</sup> Stat. 29 Car. II. c. 3. § 10. 2 Vern. 248.

<sup>y</sup> 2 Atk. 610. Amb. 17. S. C.

<sup>z</sup> 2 Vern. 525.

<sup>a</sup> Godb. 161. 8 Co. 171.

2 Nels. Abr. 783.

<sup>b</sup> Stat. 29 Car. II. c. 3. § 16.

fore if a man has judgment for a debt, and the debtor, before execution sued, alienes by fine, and five years pass, yet the plaintiff may still sue out execution <sup>c</sup>. But if one article to buy an estate, and pay the purchase-money, and afterwards a judgment is recovered against the vendor by a third person, who had no notice, yet this judgment shall not in equity affect the estate; because from the time of the articles, and payment of the money, the vendor was only a trustee for the purchaser <sup>d</sup>. In such case however, it must be understood, that the consideration paid is somewhat adequate to the thing purchased; for if the money be but a small sum, in respect of the value of the land, this shall not prevail over a mesne judgment-creditor <sup>e</sup>. And a mortgagee for a valuable consideration, and without notice <sup>f</sup> of such a covenant, shall hold place against the covenantee; for in this case, the money is lent upon the title and credit of the estate, and attaches upon the land; but it is not so in the case of a judgment-creditor, who (for aught appears) might have taken out execution against the person or goods of the party, that gave the judgment; and a judgment is  
only

<sup>c</sup> 1 Chan. Cas. 268. 1 Mod. was held, by Lord Chancellor Talbot, not to amount to constructive notice; for judgments, he said, are infinite. 2

<sup>d</sup> 1 P. Wms. 278. 10 Mod. 468. 2 Eq. Cas. Abr. 683.

<sup>e</sup> 1 P. Wms. 282. Eq. Cas. Abr. 682. but see

<sup>f</sup> Docketing a judgment Amb. 680.



only a general security, not a specific lien upon the land <sup>g</sup>.

If *A.* and *B.* recover several judgments against *C.*, and *A.* sue out an *elegit*, and have a moiety of *C.*'s lands delivered to him, and then *B.* sue out an *elegit*, the sheriff it seems can only extend a moiety of the remaining lands <sup>h</sup>. But if *A.* have two judgments against *C.*, and in the same term take out two *elegits*, on the one he may have a moiety of the whole, and on the other the other moiety, and is not restrained on the latter, to a moiety of the moiety; for in judgment of law, the whole term is but as one day <sup>i</sup>. On lending money therefore, if the lender take two several bonds and warrants of attorney, one for a part, the other for the residue of the money, and enter up two several judgments thereon, of the same term, he may take the whole of the defendant's lands under them <sup>k</sup>.

*A.* a trader, seised of lands in fee, gives a judgment to *B.*, and then, in consideration of 5000*l.* paid down, and 650*l.* to be paid at *Christmas*, articles to sell the lands to *C.* and let him into possession at *Michaelmas*, and afterwards becomes bankrupt, the judgment not being served and executed, and the 650*l.* remaining unpaid, *B.* shall

<sup>g</sup> 1 P. Wms. 279.

<sup>h</sup> Cro. Eliz. 483. 2 Bac. Abr. 350. Gilb. Exec. 55, 6.

But *qu.* whether it must not be understood in this case,

that the *elegits* were sued out in different terms?

<sup>i</sup> Hardr. 23.

<sup>k</sup> Gilb. Exec. 56.

*B.* shall only come in *pro rata* with the rest of the creditors; the words of the statute 21 *Jac.* I. c. 19. § 9. being full and plain, that all the creditors of a bankrupt, unless there is a mortgage, shall be equally paid<sup>1</sup>. But if *A.* a trader, confesses judgment to *B.* and then sells and conveys the land, for a valuable consideration, to *C.* and afterwards becomes bankrupt, it seems that the judgment-creditor shall extend the land, in the hands of *C.*, who bought prior to the bankruptcy, this not prejudicing the other creditors.

On a judgment against *A.* upon his own bond, a moiety only of his freehold property can be taken in the hands of his heir<sup>m</sup>. But if a judgment be obtained against an heir, on the obligation of his ancestor, the plaintiff was at common law entitled to execution out of the whole of the property, which he had by descent, at the time of issuing the original writ<sup>n</sup>, or filing the bill<sup>o</sup>. And by the statute 3 *W. & M.* c. 14. § 5. “in all cases where any  
“heir at law shall be liable to pay the debt of his  
“ancestor, in regard of any lands, tenements or  
“hereditaments descending to him, and shall sell,  
“alien, or make over the same, before any  
“action brought, or process sued out against him,  
“such heir at law shall be answerable for such debt  
“or

<sup>1</sup> 1 P. Wms. 737. 739.

a. b. 3 Co. 12. a. 2 Atk. 609,

<sup>m</sup> Dyer, 271. a. Carth. 107.

10. Amb. 16, 17. S. C.

3 Bac. Abr. 25.

<sup>o</sup> Carth. 245. and see 2

<sup>n</sup> Plowd. 441. Co. Lit. 102. Wms. Saund. 7. (4).

“ or debts, in an action or actions of *debt*, to the  
 “ value of the said land, so by him sold, aliened,  
 “ or made over; in which cases all creditors shall  
 “ be preferred, as in actions against executors and  
 “ administrators; and such execution shall be taken  
 “ out, upon any judgment or judgments so obtained  
 “ against such heir, to the value of the said land, as  
 “ if the same were his own proper debt or debts;  
 “ saving that the lands, tenements, and heredita-  
 “ ments *bonâ fide* aliened before the action brought,  
 “ shall not be liable to such execution.” A bond,  
 therefore, is in some cases, a preferable security to  
 a judgment.

The judgment against an *heir*, on the bond of  
 his ancestor, is *general* or *special*<sup>p</sup>. In *debt* against  
 an heir, who pleaded *riens per discent*, or any other  
 plea which was false within his own knowledge,  
 and found against him, the judgment at common  
 law was general, to recover the debt, and not  
 special, to be levied of the lands descended<sup>q</sup>. So  
 if judgment be given against an heir by *nihil dicit*<sup>r</sup>,  
 or *non sum informatus*<sup>s</sup>, or by *confession*, without  
 shewing

<sup>p</sup> 2 Rol. Abr. 70, 71. and  
 see Vin. Abr. tit. *Heir*, C. and  
 Bac. Abr. tit. *Heir and Ance-*  
*tor*, H.

<sup>q</sup> Dyer, 149. a. Bro. Abr.  
 tit. *Assets per discent*, 3.; but  
 see the statute 3 W. and M. c.

14. § 6. by which the judg-  
 ment on a plea of *riens per dis-*  
*cent*, seems to be altered.

<sup>r</sup> Dyer, 344. a. b. Plowd.  
 440. Cro. Eliz. 692.

<sup>s</sup> Dyer, 344. a. b. Plowd.  
 440.

shewing in certain what assets he has by descent<sup>t</sup>, the judgment is general: And if the profits of the lands descended, from the death of the ancestor to the time of bringing the action, are sufficient to satisfy the demand, and the plaintiff will shew it to the court, in an action of *debt* against an heir, and the defendant cannot deny it, the plaintiff shall have a general judgment, and execution presently<sup>u</sup>. But in an action of *debt* against an heir, if he acknowledge the action, and shew the certainty of the assets which he has by descent, the judgment shall be special, to recover the debt, to be levied of the lands descended<sup>v</sup>. And if the defendant plead *non est factum*, or any other plea which is not false within his own knowledge, there shall be like a judgment<sup>w</sup>.

By the statute 3 *W. & M. c. 14. § 6.* “ where  
 “ any action of debt upon specialty is brought  
 “ against an heir, he may plead *riens per discent*,  
 “ at the time of the original writ brought, or the  
 “ bill filed against him; and the plaintiff in such  
 “ action may reply, that he had lands, tenements  
 “ or hereditaments from his ancestor, before the  
 “ original writ brought, or bill filed; and if upon  
 “ issue joined thereupon, it be found for the  
 “ plaintiff, the jury shall inquire of the value of  
 “ the

<sup>t</sup> Dyer, 344. a. b. Plowd. v 2 Rol. Abr. 70. Dyer, 440. but see Dyer, 149. a. 149. a. 373. b.

<sup>u</sup> Dyer, 344. b.

<sup>w</sup> Cro. Car. 436, 7.

“ the lands, tenements or hereditaments so descended, and thereupon judgment shall be given, and execution awarded, as therein directed; but if judgment be given against such heir, by confession of the action, without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, tenements or hereditaments so descended.” The judgment against a devisee upon this statute, is the same as against an heir \*.

The relation of judgments to the first day of the term; is taken away, as against *purchasers*, by the statute of frauds and perjuries<sup>y</sup>; by which it is enacted, that “ the judge or officer who shall sign any judgments, shall, at the signing of the same, set down the day of the month and year of his so doing, upon the paper-book, docket, or record which he shall sign; which day of the month and year shall be also entered, upon the margin of the roll of the record, where the said judgment shall be entered. And such judgments, as against *purchasers bonâ fide*, for valuable considerations, of lands, tenements or hereditaments to be charged thereby, shall in consideration of law, be judgments only from  
“ such

\* See the statute, § 3. 7.      counties *Palatine*, by the 8 G.

y 29 Car. II. c. 3. § 14, 15.    I. e. 25. § 6.

extended to *Wales*, and the



“ such time as they shall be so signed, and shall not  
 “ relate to the first day of the term whereof they are  
 “ entered, or the day of the return of the original, or  
 “ filing the bail.”

This statute is confined to *purchasers*; and does not apply, as between the parties to the suit. Therefore if the defendant die in vacation, judgment may still be entered after his death, as of the preceding term, when he was living; and it will be a good judgment at common law, as of that term<sup>z</sup>; but then, the roll ought to be brought in and filed before the essoign-day of the subsequent term<sup>a</sup>. And it is said, that if judgment be signed in term-time, and in the subsequent vacation the defendant sell lands, and before the essoign-day of the next term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser<sup>b</sup>.

The operation of judgments, upon purchasers and mortgagees, is still further limited and restrained by the 4 & 5 *W. & M.* c. 20. § 3. by which it is enacted, “ that no judgment not docketed and  
 “ entered, according to that act, shall affect any  
 “ lands or tenements, as to purchasers or mortgagees, or have any preference against heirs,  
 “ executors

<sup>z</sup> 1 Salk. 87. 3 Salk. 116. 6 T. R. 368. 7 T. R. 20.

1 Ld. Raym. 695. 2 Ld. Raym. 766. 849. 869. 7 Mod. 850. 6 Mod. 191.

2. 93. S. C. 2 Salk. 401. 7 <sup>b</sup> 6 Mod. 191. *Tamen Qu.*

Mod. 39. S. C. 3 Salk. 159. if the judgment be not docketed at the time of the sale?  
 3 P. Wms. 399. Willes, 428.

“ executors or administrators, in the administration  
 “ of their ancestors, testators, or intestates’ effects.”  
 By this statute, a debt on judgment against a testator or intestate, not docketed according to the direction of the statute, is put on a level with simple-contract debts: And therefore, on a plea of *plene administravit*, to debt on judgment against the intestate, not docketed, the defendant may give in evidence payment of bond and other specialty debts, which exhausted all the assets<sup>c</sup>. And where leave is given to enter up judgment as of a preceding term, *nunc pro tunc*, the court, in order that it may not affect purchasers and mortgagees, will order it to be docketed of the term in which the application is made<sup>d</sup>.

The *dogget*, or as it is commonly called, the *docket* or *docquet*, is an *index* to the judgment, invented by the courts for their own ease; and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large<sup>e</sup>. The practice of docketing judgments seems to have first obtained in the court of Common Pleas, where the dockets were formerly entered on a separate roll, called the docket-roll or common docket; which was of so high an authority, as even to warrant an amendment of the judgment itself<sup>f</sup>. But in this court, the docket  
 was

<sup>c</sup> 6 T. R. 384. 1 Esp. Cas. trix, H. 35 G. III.

*N. Pri.* 313. S. C. 1 Bos. & <sup>e</sup> Gilb. C. P. 164, 5.

*Pul.* 307. <sup>f</sup> T. Raym. 39. Sid. 70.

<sup>d</sup> *Baker v. Baker*, Execu- Cro. Car. 574.

was originally nothing more than a note in parchment or paper, containing the christian and surnames of the plaintiff and defendant, the debt and damages recovered, with the term and number of the judgment-roll <sup>g</sup>. By a subsequent regulation, the defendants' names were required to be entered in a remembrance or docket alphabetically, for better finding out the judgments <sup>h</sup>. And at length, by the statute 4 & 5 *W. & M.* c. 20. § 2. it was enacted,

“ that the clerk of the essoins of the court of Com-  
 “ mon Pleas, and the clerk of the doggets of the  
 “ court of King's Bench, &c. shall make an alpha-  
 “ betical dogget, by the defendants' names, of all  
 “ the judgments entered in their respective courts,  
 “ of *Michaelmas* and *Hilary* terms, before the last  
 “ day of the ensuing terms; and of the judgments  
 “ of *Easter* and *Trinity* terms, before the last day of  
 “ *Michaelmas* term; under the penalty of 100*l.*:  
 “ Which dogget shall contain the names of the  
 “ plaintiff and defendant, with the addition of the  
 “ latter, (if in the record of the judgment,) the debt,  
 “ damages and costs recovered, the venue and num-  
 “ ber of the judgment-roll; and shall be fairly put  
 “ into and kept in books in parchment, to be search-  
 “ ed and viewed by all persons, at reasonable times,  
 “ paying for every term's search 4*d.* and no more.”

This

<sup>g</sup> R. E. 17 Jac. 1.

<sup>h</sup> R. E. 1657.

This statute did not supersede the former practice, of docketing the judgment in parchment or paper, which is still necessary to be done by the attornies, on entering and bringing in their rolls; but was intended to operate, in addition to that practice, by requiring the dockets to be entered in alphabetical order, by the officers of the court. Before the making of this statute, the judgment bound the lands, and the docket was nothing more than an index, to find it readily <sup>i</sup>. But now it is deemed necessary, that the judgment should be docketed, in order to bind the lands, as to purchasers and mortgagees: And if it be not docketed <sup>k</sup>, or if there be a false docket, which is as none <sup>l</sup>, though a right judgment, the purchasers or mortgagees will be safe; and in the latter case, the party grieved must take his remedy against the attorney or officer, for not docketing it truly.

The judgment should be docketed at the time of bringing in the roll, or entering it thereon, if already brought in. But though the judgment be not docketed, yet under particular circumstances, a purchaser with notice may be affected by it, in a court of equity. Thus, where a bill in equity was filed, to have satisfaction of a judgment, against a purchaser of the equity of redemption of land, or to redeem

<sup>i</sup> Gilb. C. P. 165.

<sup>l</sup> 1 Bac. Abr. 103. Gilb. C.

<sup>k</sup> 1 Str. 639. and see Barnes, P. 165. 1 Wils. 61. 2 Str. 261, 2. 1209. S. C.

redeem incumbrances, &c. and it appeared, that the purchase was made in 1718, and the judgment not docketed till 1721; the defendant insisted on the statute 4 & 5 *W. & M.* c. 20.: On the other hand it was contended, that the defendant (the purchaser) had notice of this judgment, and an allowance for it in the purchase, and that raised an equity for the plaintiff against him. By Lord Chancellor *Macclesfield*, "it is plain the defendant had notice of the judgment, and did not pay the value of the estate, and that is a strong presumption of an agreement to pay off the judgment; and since the plaintiff cannot proceed at law against the defendant upon the judgment, for want of docketing it in due time, he ought to be relieved in a court of equity:" Decreed, that the defendant pay to the plaintiff, the money *bonâ fide* due upon the judgment <sup>m</sup>.

If an attorney neglect to enter and docket the judgment in due time, by which a loss arises to his client, it seems that he is liable to an action <sup>n</sup>: And Lord *Mansfield* intimated, that it very much concerned the chief-clerk, to take care that judgments be actually entered up on the roll in due time, and docketed;

<sup>m</sup> 7 Vin. Abr. p. 53. 2 Eq. being docketed, notice to the  
Cas. Abr. 684. but see 7 Vin. purchaser or no notice is im-  
Abr. p. 54. where it is said, material. And see Cowp. 280.  
that the statute being express 712.  
and positive, that a judgment <sup>n</sup> 1 Str. 639.  
shall not bind lands, without



docketed; for that after he has received his fees for making such entry, he would be liable to an action upon the case, to be brought by a purchaser, who should have become charged with it, and had searched the roll, without finding it entered up: And he said, that the attorney who had undertaken to do this, and neglected it, would be liable indeed to the chief-clerk; but still the chief-clerk would be liable to the purchaser, who had suffered by this neglect °.

There is still another circumstance, necessary to give effect to the judgment, as against purchasers and mortgagees of lands in *Middlesex* and *Yorkshire*; namely, that it should be *registered*: for, by the 5 *Ann.* c. 18. § 4. and several subsequent statutes <sup>p</sup>,  
 “ no judgment shall affect or bind any manors,  
 “ lands, tenements or hereditaments, in those coun-  
 “ ties, but only from the time that a *memorial* of  
 “ such judgment, shall be entered at the register-  
 “ office, in such manner as therein is directed.”

During the same term in which the judgment is given, it is amendable at common law, in form or in substance <sup>q</sup>; but after that term, it is amendable no further than is allowed by the statutes of amend-

° 2 Bur. 722.

Sel. 537. Imp. K. B. 401.

<sup>p</sup> 6 *Ann.* c. 35. § 19. 7 *Append.* Chap. XXXIX. § 76,  
*Ann.* c. 20. § 18. 8 *G.* II. c. &c.

6. § 1. & 18. For the mode of <sup>q</sup> 8 *Co.* 157. *Gilb.* C. P.  
 registering judgments, see 1 108.

amendments<sup>r</sup>. Upon these statutes it has been holden, that if there be any thing to amend by, the judgment may be amended in point of form, for the misprision of the clerk<sup>s</sup>; and it is amendable by the verdict<sup>t</sup>. In a *qui-tam* action for a penalty, on the statute of usury, it is not cause of error to enter a judgment of *misericordia*<sup>u</sup>: And in other actions, the want of a *capiatur* or *misericordia*, or the substitution of one for the other, is aided by the statutes of jeofails<sup>v</sup>; which have been construed to extend to the addition of a *capiatur*, where none lies<sup>w</sup>: And the loss of the judgment-roll may be supplied by a new entry<sup>x</sup>.

<sup>r</sup> 1 Wils. 61. 2 Str. 1209.  
S. C. 4 Bur. 1988.

<sup>v</sup> 16 & 17 Car. II. c. 8. 4  
Ann. c. 16. § 2:

<sup>s</sup> 2 Str. 1132. 1156. 1182.

<sup>w</sup> 1 Str. 313.

5 Bur. 2730. 3 T. R. 349.

<sup>x</sup> *Id.* 141. 2 Str. 833. 2

<sup>t</sup> 2 Str. 787. *Ante*, 662.

Bur. 722.

<sup>u</sup> 6 T. R. 255.

## CHAPTER XL.

*Of Costs.*

**I**NCIDENT to the judgment are the *Costs*, or expences of the suit; which are *interlocutory* or *final*: the former, or such as are awarded on interlocutory matters, arising in the course of the suit, have been already considered, in treating of the matters to which they relate; the latter, or such as depend on the final event of the suit, will be the subject of the present chapter <sup>a</sup>.

No final costs were recoverable, by the plaintiff or defendant, at common law <sup>b</sup>. But by the statute of *Gloucester*, (6 *Edw. I.*) c. 1. § 2. it is provided, “ that the *demandant* may recover against “ the tenant, the costs of his *writ* purchased, “ (which, by a liberal interpretation, has been “ construed to extend to the *whole* costs of his “ suit,)

<sup>a</sup> The subject of costs, interlocutory as well as final, is treated of in a clear and perspicuous manner by Mr. *Hullock*: And the table of costs, by Mr. *Palmer*, will also be found a valuable acquisition to the profession, as it contains a full collection of bills of costs, ac-

curately drawn, and methodically arranged, by which the practiser may not only know how to charge for his business, but may see beforehand in what order it is to be conducted.

<sup>b</sup> 2 Inst. 288. Hard. 152.

“ suit<sup>c</sup>;) together with the damages given by that statute; and that this act shall hold place, in all cases where a man recovers damages.” This was the origin of costs *de incremento*<sup>d</sup>: And hence the plaintiff has, generally speaking, a right to costs, in all cases where he was entitled to damages, antecedent to, or by the provisions of, the statute of *Gloucester*<sup>e</sup>; as in *assumpsit*, covenant, debt on contract, case, trover, trespass, assault and battery, replevin, ejectment, dower *unde nihil habet*<sup>f</sup>, &c.; or where, by a subsequent statute, *double* or *treble* damages are given, in a case where *single* damages were before recoverable<sup>g</sup>; as upon the 2 *Hen. IV.* c. 11. for wrongfully suing in the admiralty court<sup>h</sup>, &c. And he has also a right to costs, in all cases where a certain *penalty* is given by statute to the party grieved<sup>i</sup>; for otherwise the remedy might prove inadequate.

But the statute of *Gloucester* did not extend to cases where *no* damages were recoverable at common law, as in *real* actions<sup>k</sup>, *scire facias*, *prohibition*<sup>l</sup>, &c.; nor where *double* or *treble* damages were

<sup>c</sup> 2 Inst. 288.

<sup>d</sup> Gilb. Eq. Rep. 195.

<sup>e</sup> 10 Co. 116. a.

<sup>f</sup> 2 Bac. Abr. 148. *Ante*, 799.

<sup>g</sup> 10 Co. 116. a. 2 Inst.

289. Cowp. 368.

<sup>h</sup> *Ante*, 800.

<sup>i</sup> Cro. Car. 560. 1 Roll.

Abr. 574. Skin. 363. Carth.

230. 1 Salk. 206. 1 Ld.

Raym. 172. Willes, 440.

Say. Costs, 11. 7 T. R. 267.

1 H. Blac. 10.

<sup>k</sup> *Ante*, 799.

<sup>l</sup> Comb. 20.

were given by a subsequent statute, in a new case where *single* damages were not before recoverable; as in *waste*, against tenant for life or years<sup>m</sup>, upon the statute of *Gloucester*, (6 *Edw. I.*) c. 5.; for not setting out tithes<sup>n</sup>, upon the 2 & 3 *Edw. VI.* c. 13.; or for driving a distress out of the hundred<sup>o</sup>, upon the 1 & 2 *Ph. & M.* c. 12. Nor does this statute extend to *popular* actions, where the whole or part of a penalty is given by statute to a common informer<sup>p</sup>; as upon the 5 *Eliz.* c. 4. § 31. for exercising a trade, without having served an apprenticeship; or upon the statute of usury, 12 *Ann.* stat. 2. c. 16. In these and such like cases therefore, the plaintiff is not entitled to costs, unless they are expressly given him by the statute; but wherever they are so given, he is of course entitled to them.

Where *single* damages are given by a statute, subsequent to the statute of *Gloucester*, in a new case wherein no damages were previously recoverable, it has been doubted whether the plaintiff shall recover costs, if they are not mentioned in the statute. The rule in *Pilfold's* case is, that he shall

<sup>m</sup> 2 *Hen. IV.* 17. 9 *Hen. VI.* 66. b. 10 Co. 116. b. 133. *Carth.* 231. 1 *Salk.* 206. 2 *Inst.* 289. *Ante*, 800. 1 *Ld. Raym.* 172. *Cas. Pr. C.*

<sup>n</sup> *Moor*, 915. *Noy*, 136. *B.* 87. *Barnes*, 124. *S. C.* *Hardr.* 152. *Cowp.* 366. 1 *H. Blac.* 10.

<sup>o</sup> 2 *Inst.* 289. *Dyer*, 177. *Bul. N. Pri.* 333.

but see *Cro. Car.* 560. 1

*Roll. Abr.* 574.



shall not<sup>a</sup>: and accordingly it is holden, that he is not entitled to costs in *quare impedit*<sup>r</sup>, wherein damages are given by the statute of *Westm. 2.* (13 *Edw. I.*) c. 5. § 3. But the rule in *Pilfold's* case is contradicted by lord *Coke* himself<sup>s</sup>, who says, that “this clause (respecting the statute of “*Gloucester's* holding place, in all cases where a “man recovers damages) doth extend to give “costs, where damages are given to any demand- “ant or plaintiff, in any action, by any statute “made *after* this parliament.” And the rule has been since narrowed, by several modern decisions; from whence it may be collected, that the plaintiff is entitled to costs, in all cases where single damages are given by statute to the *party grieved*<sup>r</sup>, although costs are not particularly mentioned in the statute.

In several of the foregoing cases, wherein costs were not recoverable by the plaintiff at common law, they are expressly given him by the statute 8 & 9 *W. III.* c. 11. by which it is enacted, that “in all actions of *waste*, and actions of *debt* upon “the statute for not setting forth *tithes*, wherein “the single value or damage found by the jury “shall

<sup>a</sup> 10 Co. 116. a.

<sup>s</sup> 2 Inst. 289.

<sup>r</sup> 2 Hen. IV. 17. 27 Hen.

<sup>r</sup> 2 Wils. 91. Barnes, 151.

VI. 10. 10 Co. 116. a. 2

S. C. 3 Bur. 1723. Say.

Inst. 289. 362. Barnes, 140.

Costs, 10. S. C. 1 T. R. 71.

and see Cro. Car. 360. Carth.

6 T. R. 355. 7 T. R. 267.

231. Cowp. 367, 8. ante, 800.

but see Cowp. 367, 8.

“ shall not exceed the sum of twenty nobles; and  
 “ in all suits upon any writ or writs of *scire facias*,  
 “ and suits upon *prohibitions*, the plaintiff obtaining  
 “ judgment, or any award of execution, after plea  
 “ pleaded or demurrer joined therein, shall likewise  
 “ recover his costs of suit; and if the plaintiff shall  
 “ become nonsuit, or suffer a discontinuance, or a  
 “ verdict shall pass against him, the defendant shall  
 “ recover his costs, and have execution for the same  
 “ by *capias ad satisfaciendum*, *fieri facias*, or *elegit*.”  
 Upon this statute there have been the following  
 determinations.

In an action of debt for the *penalty* of the statute 2 & 3 *Edw. VI. c. 13.* for not setting out tithes, with a count for the *single* value, after a demurrer to the declaration, the parties submitted to arbitration, and the arbitrator awarded the single value to be less than twenty nobles (6*l.* 13*s.* 4*d.*); the court held, that the plaintiff was not entitled to costs on the counts for the penalty, under the statute of 8 & 9 *W. III. c. 11.* the value not having been found by a jury; but they allowed him to have the costs taxed, on the count for the single value <sup>u</sup>.

In *Prohibition*, the rule is, that the plaintiff, succeeding after plea pleaded or demurrer joined, ought to have his costs from the time of the suggestion,  
 or

<sup>u</sup> 1 H. Blac. 107. and see Barnes, 150.

or first motion for a prohibition, and all costs incident and subsequent thereto<sup>v</sup>. And where the defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, the court ordered the defendant to pay the plaintiff's costs of the proceedings in prohibition<sup>w</sup>. Where the defendant in prohibition lets judgment go by default, the plaintiff is entitled, by the common law, to a writ to inquire of his *damages*, for the contempt in proceeding after the prohibition delivered; and of consequence, by the statute of *Gloucester*, to his *costs*<sup>x</sup>. In this case however, the plaintiff is only entitled to costs, from the time that the rule for a prohibition was made absolute, as the defendant could not possibly be in contempt before<sup>y</sup>: And where the plaintiff was nonsuited, it was holden that the defendant ought only to have the costs of the nonsuit, and not what were incurred by opposing the rule to shew cause, why the writ of prohibition should not be granted<sup>z</sup>. If judgment be given for the plaintiff, as to *part* of what is in issue, he is entitled to costs, although a consultation be granted as to the residue<sup>a</sup>: And in like manner, if the defendant prevail as to *part*, he is entitled to costs.

<sup>v</sup> Cas. Pr. C. B. 11. 1 Str.

<sup>y</sup> *Id.* 21.

82. 2 Str. 1062.

<sup>z</sup> Say. Costs, 137.

<sup>w</sup> Barnes, 148.

<sup>a</sup> 2 Str. 1062, 3.

<sup>x</sup> Cas. Pr. C. B. 20,

costs<sup>b</sup>. But it seems, that if the defendant succeed upon demurrer, he is not entitled to costs<sup>c</sup>; this being a *casus omissus* out of the statute. There is a proviso in the statute<sup>d</sup>, that it shall not extend to executors or administrators; and hence it has been determined, that in prohibition, they are not liable to the payment of costs<sup>e</sup>.

The plaintiff's general right to costs being thus settled and established, upon the footing of the statute of *Gloucester*, has been since altered, restrained and modified, by subsequent statutes. The first statute that restrained the plaintiff's right to costs, was the 43 *Eliz.* c. 6. (extended to *Wales*, and the counties-*palatine*, by the 11 & 12 *W.* III. c. 9.); by which it is enacted, that  
 “ if in any personal action, to be brought in any  
 “ of her majesty's courts of *Westminster*, not being  
 “ for any title or interest of lands, nor concerning  
 “ the freehold or inheritance of any lands, nor for  
 “ any battery, it shall appear to the judges of the  
 “ same court, and be so signified by the justices  
 “ before whom the same shall be tried, that the  
 “ debt or damages to be recovered therein shall  
 “ not amount to the sum of forty shillings, that  
 “ in every such case, the judges or justices before  
 “ whom such action shall be pursued, shall not  
 “ award

<sup>b</sup> Barnes, 138, 9.

<sup>c</sup> Cas. Pr. C. B. 158. Pr.

<sup>e</sup> *Brymer and Atkyns*, H.

Reg. 118. Barnes, 127. 129.

22 Geo. III. C. B.

S. C. 3 East, 202.

<sup>d</sup> § 5.

“award to the plaintiff any more costs, than the  
 “sum of the debt or damages so recovered shall  
 “amount to, but less at their discretion.” The  
 intention of this statute was to confine trifling  
 actions to inferior courts<sup>f</sup>; and a certificate may  
 be granted upon it, at any time after the trial of  
 the cause<sup>g</sup>. The first instance of a certificate being  
 granted upon this statute, was in the case of *White*  
*v. Smith*, E. 17 Geo. II.; wherein *Willes* Ch. J.  
 certified in an action for taking sand<sup>h</sup>: And since  
 that time, there have been several instances of such  
 certificates<sup>i</sup>. But as the judges, for a long time,  
 were unwilling to certify upon this statute, think-  
 ing it hard to deprive a plaintiff of his right to costs,  
 merely because he had resorted to a superior court,  
 when perhaps he could not have obtained justice  
 in an inferior one, the legislature was obliged to  
 interpose its authority, still farther to guard against  
 trifling and vexatious actions.

Thus, by the 3 *Fac.* I. c. 15. § 4. it is enacted,  
 that “if in any action of *debt*, or action upon the  
 “case upon an *assumpsit* for the recovery of any  
 “debt, to be sued or prosecuted against any citi-  
 “zen and freeman of the city of *London*, or any  
 “other person, being a victualler, tradesman or  
 “labouring

<sup>f</sup> Gilb. Eq. Rep. 196.

S. C. 3 Wils. 325.

Gilb. C. P. 261, 2.

<sup>i</sup> 2 Str. 1232. 1 Wils. 93.

<sup>g</sup> Say. Costs, 18. 3 T. R. 38. (d).

S. C. 3 Wils. 325. Say. Rep. 250. 2 Wils. 258. 3 T. R.

<sup>h</sup> 2 Str. 1232. 1 Wils. 93. 37.



“labouring man, inhabiting within the said city  
 “or the liberties thereof, in any of the king’s courts  
 “at *Westminster*, or elsewhere out of the court of  
 “requests for the same city, it shall appear to the  
 “judge or judges of the court where such action  
 “shall be sued or prosecuted, that the debt to be  
 “recovered by the plaintiff shall not amount to  
 “the sum of forty shillings, and the defendant  
 “shall duly prove, either by sufficient testimony or  
 “his own oath, that at the time of commencing  
 “such action, the defendant was inhabiting and  
 “resiant in the city of *London* or the liberties  
 “thereof, the said judge or judges shall not allow  
 “to the plaintiff any costs of suit, but shall award  
 “the plaintiff to pay so much ordinary costs to the  
 “defendant, as the defendant shall justly prove,  
 “before the said judge or judges, it hath truly  
 “cost him in defence of the suit.”

The jurisdiction of the court of requests for  
*London* was extended, by the 14 *Geo. II. c. 10.*  
 to “every citizen and freeman of the city of *Lon-*  
 “*don*, and every other person and persons inhabit-  
 “ing within the said city or its liberties, and also  
 “to persons renting or keeping any shop, shed,  
 “stall or stand, or seeking a livelihood there, who  
 “have debts owing them, not exceeding the sum  
 “of forty shillings, by any person or persons inha-  
 “biting or seeking a livelihood within the said city  
 “or its liberties, during their respective inhabi-  
 “tancy or seeking a livelihood as aforesaid<sup>j</sup>.” And  
 by

<sup>j</sup> See 5 T. R. 535. 1 East, 353, 353. (a). S. C. cited.

by the 39 & 40 Geo. III. c. 104<sup>k</sup>. it was still further extended to “ debts not exceeding the sum of 5*l*<sup>l</sup>. “ due to any person or persons, whether residing “ within the city of *London* or elsewhere, or to bodies politick or corporate, and fraternities or brotherhoods, whether corporate or not corporate, from “ any person or persons, residing or inhabiting within the said city or its liberties, or keeping any “ house, warehouse, shop, shed, stall or stand, or seeking a livelihood, or trading or dealing within the same city or liberties<sup>m</sup>. And if any action or suit shall be commenced in any other court than the said court of requests, for any debt not exceeding the sum of 5*l*., and recoverable by virtue of the former acts, or of this act, in the said court of requests, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her or them, or otherwise, have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action or suit, and the judge or judges before whom the same shall be tried or heard, shall think fit to certify that such debt ought to have been recovered in the said court of requests, then such defendant or defendants shall have double costs, and shall have such remedy for recovering “ the

<sup>k</sup> This act of parliament took effect from the 30th of *September* 1800, and not from the passing of the act, which was on the 9th of July preceding. 2 East, 135.  
<sup>l</sup> § 2.  
<sup>m</sup> § 5.

“ the same, as any defendant or defendants may have  
 “ for his, her or their costs, in any cases by law <sup>n</sup>. ”  
 This act of parliament has been construed to extend  
 to an action of *debt* for less than five pounds, on the  
 judgment of a superior court °.

Towards the latter end of the last reign, several  
 acts of parliament were also made, establishing courts  
 of conscience in various districts, in and about the  
 metropolis; as in the town and borough of *South-*  
*wark*, &c. by the 22 *Geo.* II. c. 47. (explained and  
 amended by the 32 *Geo.* II. c. 6.); in the city and  
 liberty of *Westminster*, and part of the dutchy of  
*Lancaster*, by the 23 *Geo.* II. c. 27. (explained and  
 amended by the 24 *Geo.* II. c. 42.); and in the *Tow-*  
*er-hamlets*, by the 23 *Geo.* II. c. 30. And by the 23  
*Geo.* II. c. 33. the county court of *Middlesex* was  
 put on a different footing, for the more easy and speed-  
 dy recovery of small debts.

In these acts of parliament there are exceptions,  
 relating to particular *causes* and *persons*, of which,  
 and over whom, the courts have no jurisdiction.  
 Thus, in the 3 *Jac.* I. c. 15. there is an exception  
 or proviso <sup>p</sup>, that “ it shall not extend to any debt  
 “ for *rent* upon any lease of lands or tenements, or  
 “ any

<sup>n</sup> § 12.

° 2 Bos. & Pul. 588. but see  
 3 Esp. Cas. *Ni. Pri.* 280.  
 where an action of *debt* was  
 brought in a superior court for  
 less than five pounds on a judg-

ment of the court of requests for  
*London. Sed quære*, whether  
 the plaintiff would have been  
 entitled to costs in such action.  
<sup>p</sup> § 6. and see the statute 39  
 & 40 G. III. c. 104. § 11.

“ any other real contracts, nor to any other debt  
 “ that shall arise by reason of any cause concern-  
 “ ing a testament or matrimony, or any thing  
 “ concerning or properly belonging to the eccle-  
 “ siastical court, although the same be under for-  
 “ ty shillings.” And there is a similar exception  
 in the court of conscience acts for *Westminster* <sup>q</sup>, and  
 the *Tower hamlets* <sup>r</sup>; which exception has been con-  
 strued to apply in *London*, to an action for use and  
 occupation <sup>s</sup>: and the court of conscience act there  
 does not extend to cases, where the plaintiff recovers  
 less than forty shillings, in a special action on the  
 case, for the breach of an agreement <sup>t</sup>. Also it is a  
 constant and invariable rule, that none of the court of  
 conscience acts extend to cases, where the sum re-  
 covered is reduced under forty shillings, by means  
 of a set-off <sup>u</sup>, or tender <sup>v</sup>. Where a cause is referred  
 to arbitration, and the costs are directed to abide the  
 event of the suit, the plaintiff, we have seen, is not  
 entitled to them, if it appear by the award that his  
 original demand was under forty shillings, and he  
 might have recovered it in a court of conscience <sup>w</sup>.

The

<sup>q</sup> 22 Geo. II. c. 47. § 16.

<sup>r</sup> Doug. 245.

<sup>s</sup> *Id.* 244. but it is otherwise  
 in *Middlesex*. 2 Bos. & Pul. 29.

<sup>t</sup> 5 T. R. 529.

<sup>u</sup> 2 Str. 1191. 1 Wils. 19.

S. C. 2 Wils. 68. 3 Wils. 48.

Say. Costs, 65. S. C. 1 Bos. &

Pul. 223. But it is otherwise,  
 where the plaintiff's demand is  
 reduced under forty shillings,  
 by payments in part. Barnes,  
 353. 4 Bur. 2133.

<sup>v</sup> Doug. 448, 9.

<sup>w</sup> *Ante*, 762, 3.



The court in one instance permitted a suggestion to be entered on the roll, in an action brought by an *administrator*<sup>x</sup>: But in an action brought against an *executor*, they refused it<sup>y</sup>; saying, it could not be meant to give the court of conscience a jurisdiction over executors; and that if there was no express exception, there was one implied from the nature and reason of the thing. An *attorney* is not subject to the jurisdiction of the county court of *Middlesex*<sup>z</sup>; but in *London*, *Westminster*, and the *Tower hamlets*, he is expressly subjected thereto<sup>a</sup>. And where a person is sued in a superior court, for a debt under forty shillings, he may move the court to stay the proceedings<sup>b</sup>.

The mode of taking advantage of these statutes is by *plea* or *suggestion*. Where there is a prohibitory clause in the act, declaring that “no action for any “debt under forty shillings, and recoverable in the “court of requests, shall be brought against any “person within the jurisdiction thereof, in any other “court whatsoever,” as in *Westminster*, the proper mode of taking advantage of the act is by pleading it, or giving it in evidence under the general issue<sup>c</sup>: And if that mode be not adopted, the court will not, after verdict, enter a *suggestion* on the record, that the defendant lived within the jurisdiction, or stay the

<sup>x</sup> Doug. 246.

s<sup>o</sup> e 2 Bos. & Pul. 29.

<sup>y</sup> *Id.* 263. Stat. 14 Geo. II.

<sup>a</sup> *Ante*, 265.

10. 5 T. R. 535. *Id.* 529.

<sup>b</sup> *Ante*, 465.

<sup>z</sup> 2 Wils. 42. Doug. 380.

<sup>c</sup> 2 H. Blac. 352.

Bur. 1583. *semb. contra*; and



the proceedings <sup>d</sup>. The *Tower-hamlets* act has the same prohibitory clause; and though it gives no form of plea, yet it may be pleaded, or the facts which bring a case within it may be given in evidence under the general issue, to nonsuit the plaintiff <sup>e</sup>, or obtain a verdict against him <sup>f</sup>. In the *London* act, as well as in the acts for *Southwark* and *Middlesex*, there is no such prohibitory clause; and therefore the proper mode of proceeding upon these acts is, for the defendant to apply to the court, by affidavit, for leave to enter a suggestion on the roll, of the facts necessary to entitle him to the benefit of the act <sup>g</sup>: which suggestion may be traversed, or demurred to <sup>h</sup>. The application for leave to enter a suggestion, should be made before final judgment signed <sup>i</sup>: And where the plaintiff demurred to the suggestion, which was adjudged against him, the costs of the application were allowed, as well as of the trial and former proceedings <sup>j</sup>, though not strictly speaking costs of the defence. But where the inquest is taken by default, there can it seems be no suggestion on the roll <sup>k</sup>; for the defendant is said to be out of court,

as

<sup>d</sup> 3 T. R. 452. 1 East, 354. Wils. 68. Doug. 244. and see  
 (a). S. C. cited. Append. Chap. XL. § 1.  
<sup>e</sup> 2 H. Blac. 352. <sup>h</sup> 2 H. Blac. 354.  
<sup>f</sup> 1 East, 352. <sup>i</sup> *Id. ibid.*  
<sup>g</sup> 1 Str. 47. 50. 2 Str. 1120. <sup>j</sup> 2 Str. 1120.  
 1191. Barnes, 353. Say. Rep. <sup>k</sup> 1 Str. 46. but see 2 H.  
 273. Say. Costs, 64. S. C. 2 Blac. 351.

as to all purposes, but that of having judgment against him.

By the 21 *Jac.* I. c. 16. it is enacted, that “in all  
 “actions upon the case for slanderous words, to be  
 “sued or prosecuted in any of the courts of record  
 “at *Westminster*, or in any court whatsoever that  
 “hath power to hold plea of the same, if the jury  
 “upon the trial of the issue in such action, or the jury  
 “that shall inquire of the damages, do find or assess  
 “the damages under forty shillings, then the plain-  
 “tiff or plaintiffs in such action shall have and reco-  
 “ver only so much costs as the damages so given  
 “or assessed amount unto, without any further in-  
 “crease of the same; any law, statute or usage to  
 “the contrary notwithstanding.” The operation of  
 this statute is confined to actions for slanderous words  
 spoken of the *person*, and does not extend to actions  
 for slander of *title*<sup>1</sup>, &c. wherein the special damage  
 is the gist of the action: neither, for the same reason,  
 does it extend to an action for special damage, in  
 consequence of words not in themselves actionable<sup>m</sup>;  
 though, where the words are actionable in them-  
 selves, a special damage will not take the case out  
 of the statute<sup>n</sup>. This statute applies to a writ of  
*inquiry*,

<sup>1</sup> Cro. Car. 141. 163. 1 Str.  
645.

<sup>m</sup> 2 Ld. Raym. 831. 1 Salk.  
206. 7 Mod. 129. S. C. Willes,  
438. Barnes, 132. S. C. *Id.*  
135. 2 H. Blac. 531.

<sup>n</sup> 2 Ld. Raym. 1588. 2 Str.  
936. S. C. Willes, 438. Barnes,  
132. S. C. *Id.* 142. 3 Bur.  
1688. 2 Blac. Rep. 1062. Say.  
Costs, 25. S. C. Cas. Pr. C.  
B. 137. *contra*.

*inquiry*, as well as a *trial*, where the damages are under forty shillings °; and a *justification* found for the plaintiff will not, in that event, entitle him to full costs <sup>p</sup>. In actions upon judgments, it is enacted by the statute 43 Geo. III. c. 46. § 4. that “the plaintiff shall not recover or be entitled to any costs of suit, unless the court in which such actions shall be brought, or some judge of the same court, shall otherwise order.”

But the principal statute, made for restraining the plaintiff's right to costs, is the 22 & 23 Car. II. c. 9. (extended to *Wales*, and the counties *palatine*, by the 11 & 12 W. III. c. 9.); by which it is enacted, that “in all actions of *trespass, assault and battery, and other personal actions*, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question; the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit, than the damages so found shall amount unto.” It seems to have been the intention of this statute, that the plaintiff should have no more costs than damages, in any personal action whatsoever, if the damages were under forty shillings, except in cases of battery, or freehold; and not even in these, without a certificate: And this construction was adopted, in some of the first cases that

° 2 Str. 934.

C. P. 22. 2 Wils. 258

<sup>p</sup> Barnes, 128. Cas. Pr.

that arose upon the statute <sup>q</sup>. But a different construction soon prevailed; and it is now settled, that the statute is confined to actions of assault and battery; and actions for *local* trespasses, wherein it is possible for the judge to certify, that the freehold or title of the land was chiefly in question <sup>r</sup>. Therefore it does not extend to actions of *assumpsit*, debt, covenant, trover <sup>s</sup>, false imprisonment, or the like; or to actions for a mere assault <sup>t</sup>; or for criminal conversation <sup>u</sup>, or battery of the plaintiff's servant <sup>v</sup>, *per quod consortium vel servitium amisit*.

In actions for *local* trespasses, the statute applies, wherever an injury is done to the *freehold* <sup>w</sup>, or to any thing *growing* <sup>x</sup> upon, or *affixed* <sup>y</sup> to, the freehold: and in a modern case <sup>z</sup>, it was carried still further.

<sup>q</sup> 2 Keb. 849. 3 Keb. 121. 633. 645. Gilb. Eq. Rep. 195. 247. 2 Str. 726. 2 Ld. Raym. 1444.

<sup>r</sup> T. Raym. 487. T. Jon. S. C. 6 T. R. 281.

232. 2 Show. 258. S. C. 3 Mod. <sup>x</sup> *Hill v. Reeves*, Bul. Nl.

39. 1 Salk. 208. 1 Str. 577. *Pri.* 330. Barnes, 144.

Gilb. Eq. Rep. 195. Barnes, <sup>y</sup> *Birch v. Daffey*, Bul. Nl.

134. 3 Wils. 322. S. C. 1 H. *Pri.* 330. 1 Str. 633. Cas. Pr.

Blac. 294. 2 East, 162. *Per* C. B. 86. Barnes, 121. 6 T. R.

*Lawrence, J.* 281.

<sup>s</sup> 3 Keb. 31. 1 Salk. 208. <sup>z</sup> Doug. 779. and see 1 Str.

<sup>t</sup> 3 T. R. 391. but see 6 T. 633. 645. Gilb. Eq. Rep. 197, R. 562. 8. S. C. 3 Bur. 1282. Say. Costs,

<sup>u</sup> 3 Wils. 319. 50. S. C. *accord.* but see 2

<sup>v</sup> 3 Keb. 184. 1 Salk. 208. 1 Vent. 215. Skin. 66. Com. Rep. 19. 1 Salk. 208. 1 Str.

<sup>w</sup> 2 Vent. 48. Com. Rep. 192. *semb. contra.*

19. 1 Salk. 208. 1 Str. 577.



further. That was an action of trespass *quare clausum fregit*: the first count stated, that the defendants broke and entered the close of the plaintiffs, and the grass of the plaintiffs there then growing, with their feet in walking, trod down, spoiled, and consumed; and dug up and got divers large quantities of turf, peat, sods, heath, stones, soil and earth of the plaintiffs, in and upon the place in which, &c. *and took and carried away the same*, and converted and disposed of the same to their own use: There was another count, upon a similar trespass, in another close. The defendants pleaded the general issue to the *whole* declaration, and two special pleas to the *second* count: And on the trial, a verdict was found for the plaintiffs on the general issue, with one shilling damages; and for the defendants on the special pleas, and the judge had not certified. *Per Lord Mansfield*: “ The question  
 “ on this record is, whether the plaintiffs are en-  
 “ titled to any more costs than damages, under  
 “ the statute 22 & 23 *Car.* II. c. 9.? There is a  
 “ puzzle and perplexity in the cases on this part  
 “ of the statute, and a jumble in the reports; and  
 “ as the question is a general one, we thought it  
 “ proper to consult all the judges; and they are  
 “ all of opinion, that this case is within the sta-  
 “ tute, and that the plaintiffs ought to have no  
 “ more costs than damages. You will observe,  
 “ that what has been called an *asportavit* in this  
 VOL. II. 2 F “ decla-



“ declaration, is a mode or qualification of the  
 “ injury done to the land: The trespass is laid to  
 “ have been committed on the land, by digging,  
 “ &c. and the *asportavit* as part of the same act;  
 “ and on the trial of the issue, the freehold cer-  
 “ tainly *might* have come in question. This is  
 “ clearly distinguishable from an *asportavit* of per-  
 “ sonal property, where the freehold cannot come  
 “ in question, and which therefore is not within  
 “ the act: Thus, after trees are cut down, and  
 “ thereby severed from the freehold, if a trespasser  
 “ comes and carries them away, that case is not  
 “ within the statute, because the freehold cannot  
 “ come in question; here it might.” In an ac-  
 tion for mesne-profits, if the plaintiff recover less  
 than forty shillings damages, and the judge do  
 not certify that the title came in question, the  
 plaintiff is entitled to no more costs than damages <sup>a</sup>.

Where an injury is done to a *personal* chattel,  
 it is not within the statute <sup>b</sup>; nor where an injury  
 to a personal chattel is laid in the same declara-  
 tion with an assault and battery, or local trespass <sup>c</sup>:  
 and consequently, in these cases, though the dam-  
 ages be under forty shillings, the plaintiff is en-  
 titled

<sup>a</sup> 1 Esp. Cas. *Ni. Pri.* 359. 1 Str. 192; 551. Gilb. Eq.  
 6 T. R. 593. Rep. 197. S. C. Barnes,

<sup>b</sup> 3 Keb. 389. 469. T. 119, 20. 134. 3 Wils. 322.  
 Jon. 232. 1 Salk. 208. 1 S. C. 2 Str. 1130. Say.  
 Str. 534. Gilb. Eq. Rep. Costs, 39. but see 1 Esp. Cas.  
 197. S. C. *Ni. Pri.* 255.

<sup>c</sup> 3 Mod. 39. 1 Salk. 208.

titled to full costs, without a certificate. But then it must be a substantive and independent injury: for where it is laid or proved merely in aggravation of damages, as a mode or qualification of the assault and battery, or local trespass<sup>d</sup>, or there is a verdict for the defendant upon that part of the declaration which charges him with an injury to a personal chattel<sup>e</sup>, it is within the statute. So where a *laceravit*, or tearing of the plaintiff's clothes, is laid in the declaration, or found by the jury, to be merely consequential to<sup>f</sup>, or committed at the same time<sup>g</sup> as an assault and battery, the plaintiff, recovering less than forty shillings damages, is not entitled to full costs, without a certificate.

The certificate required by this statute need not, it seems, be granted at the trial of the cause<sup>h</sup>. And where the defendant lets judgment go by default<sup>i</sup>, or *justifies* the assault and battery<sup>j</sup>, or pleads in such a manner as to bring the freehold or title of the land in question, on the face of the record, or a *view* is granted<sup>k</sup>, a certificate is holden to be unnecessary. But where, in an action for an assault and battery, the defendant justifies the assault only<sup>l</sup>,  
or

<sup>d</sup> 1 Str. 624. *Ante*, 881, 2.

<sup>h</sup> 11 Mod. 198. *Post*. 887.

<sup>e</sup> 2 Vent. 180. 195. Cas.

<sup>i</sup> Bul. *Ni. Pri.* 329.

Pr. C. B. 118.

<sup>j</sup> 6 T. R. 562.

<sup>f</sup> Say. Rep. 91. 1 T. R. 655.

<sup>k</sup> 1 Ld. Raym. 76. 2

<sup>g</sup> 1 H. Blac. 291. 5 T. R. Salk. 665. S. C.

482.

<sup>l</sup> 3 T. R. 391.

or an assault only is certified by the judge<sup>m</sup>, the plaintiff, recovering less than forty shillings, is not entitled to more costs than damages; though, in the latter case, to entitle him to full costs, the judge may certify, on the 8 & 9 *W. III. c. 11.* that the assault was wilful and malicious<sup>n</sup>. The *award* of an arbitrator is not tantamount to a judge's certificate, under the 22 & 23 *Car. II. c. 9*°.

Where the plaintiff recovered less than forty shillings damages, and the plea or issue, though special, was *collateral* to the question of freehold or title to the land, as where the defendant justified an entry as bailiff under process, and issue was joined upon the door's being shut<sup>p</sup>, or where, upon a plea of a distress for rent, there was an issue on the defendant's being bailiff<sup>q</sup>, a certificate was formerly holden to be necessary, to entitle the plaintiff to full costs: for it was considered, that a plaintiff who recovered less than forty shillings damages, in trespass *quare clausum fregit*, was not entitled to full costs, unless the freehold or title appeared to have come in question, either by the judge's certificate, or by the pleadings. But it has since been determined, in several cases<sup>r</sup>, that if the defendant in trespass *quare clausum fregit*, plead a licence, or other justification, which does not make  
title

<sup>m</sup> 2 Lev. 102.

<sup>n</sup> 3 Wils. 326.

<sup>o</sup> 3 T. R. 138.

<sup>p</sup> 2 Barnard. K. B. 277.

<sup>q</sup> Say. Rep. 250.

<sup>r</sup> 2 H. Blac. 2. 341. 7 T. R. 659.

title to the land, and it is found against him, the plaintiff is entitled to full costs, though he do not recover forty shillings damages: The principle on which these determinations have proceeded is, that where the case is such, that the judge who tries the cause cannot in any view of it grant a certificate, it is considered to be a case out of the statute<sup>s</sup>. So on a plea of not guilty to a new assignment of *extra viam*, the plaintiff obtaining a verdict for less than forty shillings damages, is entitled to full costs, without a judge's certificate<sup>t</sup>; unless the way pleaded be set forth by metes and bounds<sup>u</sup>. And where the plaintiff is entitled to costs upon the new assignment, he is entitled to the costs of all the previous pleadings<sup>v</sup>.

None of the statutes made for restraining the plaintiff's right to costs, except the 21 *Jac.* I. c. 16.<sup>w</sup>, extend to actions brought in an *inferior* court,

<sup>s</sup> 7 T. R. 660.

<sup>t</sup> 2 Lev. 234. 2 Ld. Raym. 1444. 2 Str. 726. S. C. *Id.* 1168. Say. Rep. 251. *Cockerill v. Allanson*, T. 22 G. III. K. B. Hul. Costs, 86. S. C. 1 East, 350. but see Barnes, 124. 129. S. C. *Id.* 149. Bul. *Ni. Pri.* 330. *contra.*

<sup>u</sup> *Cockerill v. Allanson*, T. 22 G. III. K. B. Hul. Costs, 86. S. C. 1 East, 351.

<sup>v</sup> 1 T. R. 636.

<sup>w</sup> Hul. 39. And it hath been

holden, that courts-baron, and other inferior courts, wherein the jury are precluded from legally assessing damages to the amount of forty shillings, are not within the meaning or intent of this statute, but that such courts have still a power of allowing full costs, in actions of *slander* prosecuted therein, however small the *quantum* of damages found or assessed may be. 1 Ld. Raym. 181.

court, and removed by the defendant into a *superior* one<sup>x</sup>: And it has been holden, that the latter statute<sup>y</sup>, as well as the 22 & 23 *Car. II. c. 9.*<sup>z</sup>, only restrains the *court* from awarding more costs than damages; but the *jury*, not being restrained thereby, may give what costs they please.

The restraint put upon the plaintiff's general right to costs, by the 22 & 23 *Car. II. c. 9.* has been since *partly* taken off, by subsequent statutes. Thus, by the statute 4 & 5 *W. & M. c. 23. § 10.* after reciting, that great mischiefs ensue by inferior trademen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours, it is enacted, that "if any such person shall  
 " presume to hunt, hawk, fish, or fowl, (unless in  
 " company with the master of such apprentice, duly  
 " qualified by law,) such person shall be subject to  
 " the penalties of this act, and shall or may be  
 " sued or prosecuted for his wilful trespass, in such  
 " his coming on any person's land; and if found  
 " guilty thereof, the plaintiff shall not only reco-  
 " ver his damages thereby sustained, but his *full*  
 " costs of suit; any former law to the contrary  
 " notwithstanding." It has been holden, that a  
*clothier*

<sup>x</sup> 2 Lev. 124. 4 Mod. 378,      <sup>y</sup> 1 Salk. 207.

<sup>z</sup> 1 Ld. Raym. 395. Cas. Pr.      <sup>z</sup> Cas. Pr. C. B. 45.  
 C. B. 45 (a).



*clothier* is an inferior tradesman, within the meaning of this statute<sup>2</sup>; and it is said, that the words “*inferior tradesmen*” extend to every tradesman who is not qualified to kill game<sup>3</sup>: but this was doubted in a subsequent case<sup>4</sup>, wherein the judges were divided in opinion upon the question, whether a *surgeon* and *apothecary* should be considered as an inferior tradesman.

So by the 8 & 9 *W.* III. c. 11. § 4. for the preventing of wilful and malicious trespasses, it is enacted, that “in all actions of trespass, to be commenced or prosecuted in any of his majesty’s courts of record at *Westminster*, wherein at the trial of the cause it shall appear, and be certified by the judge under his hand, upon the back of the record, that the trespass, upon which any defendant shall be found guilty, was *wilful* and *malicious*, the plaintiff shall recover not only his damages, but his *full* costs of suit; any former law to the contrary notwithstanding<sup>5</sup>.” The certificate required by this statute, need not be granted at the trial of the cause<sup>6</sup>; and if it appear on the trial, that the trespass, howevr trifling, was committed after notice, and the jury give less than  
forty

<sup>a</sup> Barnes, 125. and see 1 *Ld.*  
Raym. 149. *Com. Rep.* 26.  
S. C.

<sup>b</sup> 2 *Wils.* 70. *Say. Costs*,  
54. S. C.

<sup>c</sup> For the exposition of this

statute, see 3 *Wils.* 325.

<sup>d</sup> *Swinerton v. Jarvis*, E. 22  
Geo. III. C. B. 1 T. R. 636.

6 T. R. 11. 7 T. R. 449. K. B.  
but see 2 *Wils.* 21. *Doug.* 108.

n. *contra*.

forty shillings damages, it has been usual for the judge to consider himself bound to certify, that the trespass was wilful and malicious, in order to entitle the plaintiff to his full costs <sup>e</sup>.\*

Where the declaration consists of several counts, the plaintiff in this court is only entitled to the costs of such as are found for him <sup>f</sup>; and neither party is allowed the costs of those which are found for the defendant <sup>g</sup>. Where the plaintiff's declaration consisted of two counts, to one of which the defendant pleaded the general issue, which was found for the plaintiff, and to the other a justification, to which the plaintiff demurred, and judgment was thereupon given for the defendant; the court agreed, that the defendant could have no costs upon the demurrer <sup>h</sup>. But if there be two distinct causes of action, in two separate counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue, and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff

\* 6 T. R. 11. and see 7 T. R. 449.

<sup>f</sup> But it is otherwise in the Common Pleas; for there, if the plaintiff succeed upon any one of the counts, he is entitled to the costs of his whole declaration, though the defendant succeed upon the others. Bul. *Ni. Pri.* 335. 2 Blac. Rep. 800. 1199. 6 T. R. 602. 2 Bos. & Pul. 49. but see

the case put by *Le Blanc*, Just. 8 T. R. 467.

<sup>g</sup> Say. Costs, 212. Doug: 677. 6 T. R. 602, 3. 2 Bos. & Pul. 50. (*b*). but see 1 Wils. 331.

<sup>h</sup> Say. Costs, 211. 2 Bur. 1232. S. C. but differently reported. *Tamen quere*, and see the stat. 8 & 9 W. III. c. 11. § 2.

\* From the *Addenda to the London edition*. "The granting of a certificate however, upon this statute, seems to be discretionary in the judge before whom the trial is had, who may certify or not, according as it appears to him, under the circumstances proved, that the trespass was wilful and malicious: And the judge having declined to certify, in a case where notice was given by the plaintiff's wife to the defendant not to enter the *locus in quo* in his cart, there being no road there, notwithstanding which the defendant persisted in going on, in the exercise of a disputed right of common in an adjoining in-

plaintiff is intitled to judgment and costs on the first count<sup>i</sup>. So where the declaration in *trespass* consisted of one count only, to which there were several pleas of justification, on which issues were taken, and a new assignment on which judgment passed by default, and a *venire* was awarded, as well to assess the damages on the judgment by default, as to try the issues; all the issues being found for the defendant, it was holden that he was intitled to the costs of them<sup>j</sup>.

An inclosure-act directed, that the parties who were dissatisfied with the determination of the commissioners, might bring actions to try their rights, adding "that if the verdict should be in favour of "the commissioners' determination, the costs should "be borne by the plaintiff, and if against such determination, then by the proprietors at large:" A proprietor brought an action, claiming nine distinct rights, and recovered for three only; and the court held, that he should only have his costs on those issues which were found for him, and that the defendant should have his costs of the other issues<sup>k</sup>.



It has already been observed<sup>l</sup>, that no costs were recoverable by a *defendant* at common law:  
And

<sup>i</sup> 3 T. R. 654, and see 6 East, 350.

T. R. 602, 3.

<sup>k</sup> 6 T. R. 599.

<sup>l</sup> 8 T. R. 466. and see 1

<sup>1</sup> *Ante*, 864.

And the reason seems to be, that if the plaintiff failed in his suit, he was amerced to the king *pro falso clamore*, which was thought to be a sufficient punishment, without subjecting him to the payment of costs. The first instance of costs being given to a defendant, was in a writ of right of *ward*, by the statute of *Marleberge*, (52 *Hen. III.*) c. 6. Afterwards, costs were given to the defendant in *error*, by the 3 *Hen. VII.* c. 10. and 19 *Hen. VII.* c. 20. and in *replevin*, by the 7 *Hen. VIII.* c. 4. and 21 *Hen. VIII.* c. 19, &c. But in one of these cases, the defendant is to be considered as an actor; and in the other of them, the provision is virtually for the benefit of the plaintiff in the original action <sup>m</sup>.

In *replevin*, or second deliverance, the defendant, making avowry, cognizance, or justification, for rents, customs, or services, or for damage feasant, is intitled to costs, by the 7 *Hen. VIII.* c. 4, § 3. and 21 *Hen. VIII.* c. 19. § 3. if the avowry, cognizance, or justification be found for him, or the plaintiff be nonsuit, or otherwise barred; which statutes extend to avowries, &c. made by an *executor* <sup>n</sup>, or for an *estray* <sup>o</sup>, and as it should seem, for an *amercement* by a court-leet <sup>p</sup>; but not to pleas of *prisel en auter lieu*, upon which the writ is abated <sup>q</sup>, or to pleas of *property* in the thing distrained.

<sup>m</sup> Say. Costs, 70.

Cro. Eliz. 300. *semb. contra.*

<sup>n</sup> 2 Rol. Rep. 457.

<sup>q</sup> Com. Rep. 122. 2 Ld.

<sup>o</sup> Cro. Eliz. 330.

Raym. 788. S. C.

<sup>p</sup> Cro. Jac. 520. but see



trained<sup>r</sup>. By the 17 *Car.* II. c. 7. § 2. the defendant obtaining judgment thereon, for the arrearages of rent, or value of the goods distrained, is also intitled to his *full* costs of suit. And by the 11 *Geo.* II. c. 19. § 22. if the defendant avow, or make cognisance in *replevin*, upon a *distress* for rent, relief, heriot, or other service, and the plaintiff be nonsuit, discontinue his action, or have judgment against him, the defendant shall recover *double* costs of suit. But this latter statute does not extend to a rent-charge<sup>s</sup>, or *seisure* for a heriot *custom*<sup>t</sup>: And where by a canal act, the company were authorised to take certain lands for the purposes of the act, on making certain payments, either by annual rents or sums in gross; and the persons from whom the land was to be taken, were empowered to distrain the goods of the company, even off the premises, in case of non-payment of such sums; an avowant, stating a distress under this act of parliament, was holden not to be intitled, on obtaining a verdict, to double costs under the statute of 11 *Geo.* II. c. 19. § 22<sup>u</sup>.

By the statute 23 *Hen.* VIII. c. 15. § 1. it was enacted, that “ in trespass upon the statute 5 *Rich.* II. debt, covenant, detinue, account, trespass  
“ on the case, or upon any statute for an offence  
“ or wrong personal, immediately supposed to be  
“ done to the plaintiff, if the plaintiff, after the  
“ appear-

<sup>r</sup> Hardr. 153.

Say. Costs, 107.

<sup>s</sup> Willes, 429. 1 Bos. & Pul. 214.

<sup>u</sup> 7 T. R. 500. and see 1 Bos. & Pul. 213. S. P.

<sup>t</sup> Barnes, 148. 2 Wils. 28.



“appearance of the defendant, be nonsuited, or a  
 “verdict pass against him, the defendant shall have  
 “judgment to recover his costs against the plaintiff,  
 “to be assessed and taxed by the discretion of the  
 “judge or judges of the court where such action  
 “shall be commenced or sued; and shall have such  
 “process and execution for the recovery of the same,  
 “against the plaintiff, as the plaintiff should or might  
 “have had against the defendant, in case judgment  
 “had been given for the plaintiff.”

*Executors and administrators* are not particularly excepted out of the statute 23 Hen. VIII. c. 15; yet as that statute only relates to contracts made with, or wrongs done to the plaintiff<sup>v</sup>, it has been uniformly holden<sup>w</sup>, that they are not liable to costs, upon a nonsuit or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right; as upon a *contract* entered into with the testator or intestate<sup>x</sup>,  
 or

<sup>v</sup> 2 Str. 1107.

<sup>w</sup> Cro. Eliz. 503. Cro. Jac. 229. 2 Bulst. 261. 1 Salk. 207. 314. 3 Bur. 1586. Say. Costs, 97.

<sup>x</sup> T. Jon. 47. 1 Vent. 92. 2 Ld. Raym. 1414. 1 Str. 682. S. C. Cas. Pr. C. B. 157. Pr. Reg. 118. S. C. Barnes, 141. 1 H. Blac. 528. 1 Bo. & Pul. 445. 2 Bos. & Pul. 253. 2 East, 395. *Cook and others, Executors, v. Lucas*, E. 42 G. III. But though an

executor or administrator, necessarily suing as such, upon a contract entered into with the testator or intestate, is not made liable to costs by the statute, and no costs can be awarded against him on record; yet in a late case, where the plaintiff sued as administrator, upon a contract made with his intestate, and assigned by the plaintiff to J. S. for whose benefit the action was brought, and it appeared

or for a *wrong* done in his life-time<sup>y</sup>. But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as upon a *contract*<sup>z</sup>, express or implied, or in *trover*<sup>a</sup>, for a conversion after the death of the testator or intestate: And executors or administrators are not necessarily exempted from costs, on interlocutory motions<sup>b</sup>. An executor or administrator is liable to costs, upon a judgment of *non-pros*<sup>c</sup>: And where he has *knowingly* brought a wrong action, or otherwise been guilty of a *wilful* default, he shall pay costs upon a discontinuance<sup>d</sup>, or for not proceeding to trial according to notice<sup>e</sup>; but otherwise he is not liable to

appeared in evidence that the contract had been annulled, with the privity both of the plaintiff and J. S. and that the former was indemnified by the latter; a verdict being found for the defendant, the court of common pleas made a rule upon the plaintiff, to pay the defendant his costs, as for a contempt, in fraudulently abusing the process of the court. 3 Bos. & Pul. 115.

<sup>y</sup> Barnes, 129.

<sup>z</sup> 6 Mod. 91. 181. 1 Salk. 207. S. C. 1 Ld. Raym. 436. 1 Str. 682. Barnes, 119.

2 Str. 1106. 4 T. R. 277.

5 T. R. 234. 2 East, 396.

<sup>a</sup> Com. Rep. 162. Cas. Pr. C. B. 61. Barnes, 132. Cas. temp. Hardw. 204. 7 T. R. 358. *Monkland v. De Grainge*, M. 41 G. III. but see 3 Lev. 60. *semb. contra*.

<sup>b</sup> *Per Cur.* M. 42 G. III.

<sup>c</sup> Cas. Pr. C. B. 14. 157, 8. 3 Bur. 1585. 6 T. R. 654.

<sup>d</sup> Cas. Pr. C. B. 79. 3 Bur. 1451. 1 Blac. Rep. 451. S. C. *Ante*, 628.

<sup>e</sup> Cas. Pr. C. B. 158. 3 Bur. 1585. 1 H. Blac. 217.

to costs, in either of these cases<sup>f</sup>. Nor, where he merely sues *en auter droit*, is he liable to costs, upon a judgment as in case of a nonsuit<sup>g</sup>.

Executors and administrators are liable to costs, when defendants, if they plead falsely<sup>h</sup>; and the judgment in such case is, that the costs be levied, of the goods of the testator or intestate, if the defendant hath so much thereof in his hands to be administered, and if not, *de bonis propriis*<sup>i</sup>. A bankrupt sued as executor, pleaded a false plea, and it being found against him, the plaintiff had judgment for the costs *de bonis propriis*, after which he had obtained his certificate; and the court held, that this judgment for the costs was not discharged by the certificate<sup>k</sup>. But where an executor or administrator pleads *plene administravit*, and the plaintiff, admitting the truth of the plea, takes judgment of *assets in futuro*, the defendant is not liable to costs<sup>l</sup>. So where an executor or administrator pleads several pleas to the whole declaration,

as

<sup>f</sup> 2 Str. 871. Barnes, 133. terminated in the Common  
4 Bur. 1927. Say. Costs, 96, Pleas: and it seems that the  
7. S. C. defendant is not liable to costs,

<sup>g</sup> 4 Bur. 1928. *Per Cur.* where he pleads *plene adminis-*  
T. 37 Geo. III. Barnes, 130. *travit præter*, and the plain-  
2 H. Blac. 277. 2 East, 396. tiff, admitting the truth of the

<sup>h</sup> Plowd. 183. Hut. 69. 79. plea, takes judgment of the

<sup>i</sup> 4 T. R. 648. 7 T. R. 359. assets admitted in part, and

<sup>k</sup> 3 Bur. 1368. 1 Blac. Rep. for the residue, of assets *in fu-*  
400. S. C. *Ante*, 182. *turo*. See Rast. Ent. 323. 8

<sup>l</sup> Imp. K. B. 428. where Co. 134. 2 Saund. 226. Sid.  
it is said to have been so de- 448. S. C.

as *non assumpsit* and *plene administravit*, and one of them is found for him, he is intitled to the *postea* and costs, though the other plea be found against him. But if the plaintiff take judgment of *assets in futuro*, upon the plea of *plene administravit*, and go to trial upon the plea of *non assumpsit*, he will be intitled to costs, if he obtain a verdict; and therefore in such case, unless the defendant has a good ground of defence upon *non assumpsit*, it is usual for him to move to withdraw his plea, which the court will permit him to do, upon payment of costs<sup>m</sup>.

There being still many cases, in which the defendant was not aided by the provisions of the before-mentioned statutes<sup>n</sup>, it was enacted by the statute 4 *Jac.* I. c. 3. that “if any person shall commence in any court, any action of trespass, “*ejectione firma*, or any *other* action whatsoever, “wherein the plaintiff or demandant might have “costs, in case judgment should be given for him, “and the plaintiff or demandant shall be non- “suited therein, after the appearance of the defendant, or a verdict shall pass against him by “lawful trial, that then the defendant, in every “such action, shall have judgment to recover his “costs against the plaintiff or demandant, to be “assessed and levied in like manner as upon the “23 *Hen.* VIII. c. 15.” By the above statute, the defendant is intitled to costs, on a nonsuit or verdict,

<sup>m</sup> 2 Blac. Rep. 1275.

Bul. A7. Pri. 334.

<sup>n</sup> 2 Leon. 9. 3 Leon. 92.

verdict, in all cases where the plaintiff would have been entitled to them, if he had obtained judgment; as in *assumpsit* °, &c. And though the declaration be insufficient, so that the plaintiff could not have had costs thereon, the defendant is nevertheless intitled to costs, for the unjust vexation<sup>p</sup>. But this statute, being framed upon the model of the 23 *Hen. VIII. c. 15.* does not extend, any more than that, to actions brought by executors or administrators<sup>q</sup>.

The statutes which have been hitherto mentioned, as giving costs to defendants, only relate to cases where the plaintiff is nonsuited, or has a verdict against him. But there are other statutes, by which the defendant is intitled to costs upon a *nolle prosequi*, *non-pros*, discontinuance, or demurrer; or where the plaintiff does not recover the amount of the sum for which the defendant was arrested, provided it appear that he had not any reasonable or probable cause for arresting him to that amount, and the court shall thereupon make a rule or order for the allowance of such costs.

By the 8 *Eliz. c. 2.* “ upon process issuing out  
“ of the court of King’s Bench, if the plaintiff do  
“ not declare in three days after bail put in, or  
“ if after declaration, he do not prosecute his suit  
“ with effect, but willingly suffer the same to be  
“ delayed or discontinued, or he be nonsuited  
“ therein, the judges, by their discretions, shall  
“ award to the defendant his costs, damages and  
“ charges in that behalf sustained.” If the plaintiff enter a *nolle prosequi*, the defendant is intitled to costs upon this statute<sup>r</sup>. But it does not extend,  
any

° *Ante*, 865.

<sup>p</sup> Moor, 625. 1 Bulst. 189.

3 Bulst. 248. Hob. 219.

<sup>r</sup> Hut. 16. S. C. Cro. Car. 175

but see Cro. Jac. 158, 9. *semb.*

*contra.*

<sup>q</sup> Gilb. C. P. 271.

<sup>r</sup> 3 T. R. 511.



any more than the former, to actions brought by executors and administrators<sup>s</sup> in their representative character.

By the 13 *Car.* II. stat. 2. c. 2. § 3. it is enacted, that “upon an appearance entered for the defendant by attorney, of the term wherein the process is returnable, unless the plaintiff shall put into the court from whence the process issued, his bill or declaration against the defendant, in some personal action or ejectment of farm, before the end of the term next following after appearance, a nonsuit for want of a declaration may be entered against him; and the defendant shall have judgment to recover costs against the plaintiff, to be taxed and levied in like manner as upon the 23 *Hen.* VIII. c. 15.”

And still further to discourage the bringing of frivolous and vexatious actions, it is enacted, by the statute 8 & 9 *W.* III. c. 11. § 2. that “if any person shall commence or prosecute any action, in any court of record, wherein upon *demurrer*, either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendum*, *fieri facias*, or *elegit*.” This statute  
does

<sup>s</sup> Cro. Eliz. 69. Cro. Jac. 361.

does not extend to demurrers to pleas in abatement<sup>t</sup>; nor any action, wherein the defendant would not have been entitled to costs, upon a nonsuit or verdict<sup>n</sup>. \*

The plaintiff, we may remember, is not entitled to costs in a *popular* action, for the whole or part of the penalty given by statute to a common informer, unless they are expressly given him by the statute<sup>v</sup>. Nor was the defendant entitled to costs in such an action, until the statute 18 *Eliz.* c. 5. § 3. (made perpetual by the 27 *Eliz.* c. 10.) by which it is enacted, that “if any *common informer* shall willingly “delay his suit, or shall discontinue, or be nonsuit, “or shall have the matter pass against him therein “by verdict or judgment in law, the said informer “shall pay to the defendant his costs, charges, and “damages, to be assigned by the court in which the “suit shall be attempted:” With a proviso, that “this act shall not extend to any officer, who in re- “spect of his office, has heretofore usually sued “upon penal laws; nor to any officer, suing only “for matters concerning his office<sup>w</sup>.” This act of parliament,

<sup>t</sup> 1 *Ld. Raym.* 337. 1 *Salk.* 194. 12 *Mod.* 195. *Comb.* 482. *S. C.* 2 *Ld. Raym.* 992. 1 *Salk.* 194. 6 *Mod.* 88. *S. C.*

<sup>v</sup> *Cas. Pr. C. B.* 25. 1 *H. Blac.* 530. but see *Cas. Pr. C. B.* 4. *contra.*

<sup>w</sup> *Ante*, 866.

<sup>w</sup> 2 *Ld. Raym.* 1333. *Bul.*

*N. Pri.* 324. and see the statute 24 *Hen. VIII.* c. 8. which exempts plaintiffs, suing to the use of the king, in any action whatsoever, from the payment of costs, in case they be nonsuited, or a verdict pass against them. See also 7 *T. R.* 367.

\* *From the Addenda to the London Edition.* “And for the more effectual prevention of frivolous and vexatious arrests and suits, it is enacted by the statute 43 *Geo. III.* c. 46. § 3. that “in all actions to be “brought in *England* or *Ireland*, wherein the defendant or defendants “shall be arrested and held to special bail, and wherein the plaintiff “or plaintiffs shall not recover the amount of the sum for which the “defendant or defendants in such actions shall have been so arrested “and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the “court

parliament, which seems to give costs upon arrest of judgment <sup>x</sup>, extends to actions brought upon a *subsequent* statute <sup>y</sup>, or one that is *repealed* <sup>z</sup>; and also to actions *qui tam*, for *part* of a penalty, as well as where the *whole* is given to a common informer <sup>a</sup>: But it does not extend to actions, brought by the party grieved, upon a *remedial* statute <sup>b</sup>.

Where there are several defendants, who succeed in the action, the plaintiff may pay costs to which of them he pleases <sup>c</sup>: And if they fail, each of them is answerable for the whole costs. Thus, where an ejectment was brought against several defendants, who defended severally, and at the assizes one of them confessed lease, entry and ouster, and had a verdict against him, but the others did not confess; the court upon application said, the officer must tax the same costs against all the defendants; and that if the plaintiff, after he had satisfaction against one, should take out execution against another, the latter might apply to the court <sup>d</sup>.

Where one of several defendants lets judgment go by default, and the other pleads a plea which goes to the whole declaration, and shews that the plaintiff

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|---|---|
| <sup>x</sup> Gilb. C. P. 271. but see   | Vin. Abr. 341, 2. S. C.                   |
| Hul. Costs, 203.                        | <sup>b</sup> 1 And. 116. 2 Leon. 116.     |
| <sup>y</sup> Willes, 392. 440. 1 Wils.  | 4 Leon. 55. Cro. Eliz. 177.               |
| 177.                                    | Hut. 22. 1 Salk. 30.                      |
| <sup>z</sup> Hut. 35, 6. 2 Keb. 106.    | <sup>c</sup> 1 Str. 516. 2 Str. 1203.     |
| <sup>a</sup> Cowp. 366. Say. Costs, 75. | <sup>d</sup> Bul. <i>Ni. Pri.</i> 335, 6. |
| S. C. and see 2 Str. 1103. 6            |   |

“ court in which such action shall have been brought; provided that  
 “ it shall be made appear, to the satisfaction of the court in which  
 “ such action is brought, upon motion to be made in court for that  
 “ purpose, and upon hearing the parties by affidavit, that the plaintiff  
 “ or plaintiffs in such action had not any reasonable or probable cause  
 “ for causing the defendant or defendants to be arrested and held to  
 “ special bail in such amount as aforesaid, and provided such court shall  
 “ thereupon, by a rule or order of the same court, direct that such  
 “ costs shall be allowed to the defendant or defendants: And the  
 “ plaintiff

plaintiff had no cause of action, if this plea be found for the defendant who pleaded it, he shall have costs; and being an absolute bar, the other defendant shall have the benefit of it, and shall not pay costs to the plaintiff<sup>e</sup>. But where the plea does not go to the whole, but is merely in *discharge* of the party pleading it, there the other party shall not have the benefit of it; but shall pay costs, though it be found against the plaintiff<sup>f</sup>.

Before the statute 8 & 9 W. III. c. 11. if one of several defendants had been *acquitted*, he was not entitled to his costs; the courts construing the former acts to relate only to the case of a total acquittal, of all the defendants<sup>g</sup>. This being found inconvenient, it was enacted by the same statute, § 1. that “where several persons shall be made  
“defendants, to any action of trespass, assault,  
“false imprisonment, or *ejectione firmæ*, and any  
“one or more of them shall be, upon the trial  
“thereof, acquitted by verdict, every person so  
“acquitted shall recover his costs of suit, in like  
“manner as if the verdict had been given against  
“the plaintiff, and acquitted all the defendants;  
“unless the judge, before whom the cause is  
“tried,

<sup>e</sup> Co. Lit. 125. Cro. Jac. Reg. 102. S. C.

134. 1 Lev. 63. 1 Sid. 76. 1 <sup>f</sup> *Id. ibid.* 1 Wils. 89. 3 T.  
Keb. 284. S. C. 2 Id. Raym. R. 656.

1372. 1 Str. 610. 8 Mod. 217. <sup>g</sup> 2 Str. 1005. and see 1 Salk.  
S. C. Cas. Pr. C. B. 107. Pr. 194.

“plaintiff or plaintiffs shall, upon such rule or order being made as  
“aforesaid, be disabled from taking out any execution for the sum  
“recovered in any such action, unless the same shall exceed, and  
“then in such sum only as the same shall exceed, the amount of the  
“taxed costs of the defendant or defendants in such action; and in  
“case the sum recovered in any such action shall be less than the  
“amount of the costs of the defendant or defendants to be taxed as  
“aforesaid, that then the defendant or defendants shall be entitled,  
“after deducting the sum of money recovered by the plaintiff or plain-  
“tiffs



“ tried, shall immediately after the trial thereof, in  
 “ open court, certify upon the record under his hand,  
 “ that there was a reasonable cause for making such  
 “ person a defendant.” This statute is confined to the  
 particular actions therein mentioned; and does not  
 extend to an action of trespass upon the *case*<sup>h</sup>, nor  
 consequently to an action of *trover*<sup>i</sup>: neither does it  
 extend to an action of *replevin*<sup>k</sup>, or to an action of  
*debt* on bond against executors, one of whom was  
 acquitted on the plea of *plene administravit præter*<sup>l</sup>.

When a *feigned* issue is ordered by a court of  
*law*, whether it be in a civil or criminal proceed-  
 ing, the costs always follow the verdict, and must  
 be paid to the party obtaining it<sup>m</sup>. But when a  
 feigned issue is ordered by a court of *equity*, the  
 costs do not follow the verdict, as a matter of  
 course; but the finding of the jury is returned back  
 to the court which ordered the issue, and the costs  
 there are in the discretion of the court<sup>m</sup>. Where  
 the

<sup>h</sup> 2 Str. 1005.

<sup>i</sup> Barnes, 139.

<sup>k</sup> 3 Bur. 1284. 1 Blac. Rep. 355. Say. Costs, 215. S. C.

<sup>l</sup> *Duke of Norfolk v. Anthony and another*, E. 42 G. III.

<sup>m</sup> *Still and Rogers*, 1 Lil. P. R. 344. *Per Holt*, Ch. J. Barnes, 130. 1 Wils. 261. 331. Say. Rep. 24. 1 Wils. 324. S. C. and see Burt. Prac. Excheq. 248, 9. Peake, Cas. N. Pri.

69. 204. But in the case of *Hoskins v. Ld. Berkeley*, (4 T. R. 402.) the court strongly intimated an opinion, that as feigned issues were only granted with the leave of the court, it would be prudent in future, when they permitted such issues to be tried, to compel the parties to consent, that the costs should be in the discretion of the court.

“ tiffs in such action, from the amount of his or their costs so to be  
 “ taxed as aforesaid, to take out execution for such costs, in like man-  
 “ ner as a defendant or defendants may now by law have execution for  
 “ costs in other cases.”



the issue is ordered by a court of law, on a rule for an information <sup>n</sup>, or motion for an attachment <sup>o</sup>, the costs of the original rule or motion do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned from the time when the feigned issue was first ordered and agreed to <sup>p</sup>. Yet, where it was ordered by the consent-rule, that the costs should abide the event of the issue, the court directed the *whole* costs to be paid under it <sup>q</sup>.



Having thus shewn, in what cases the parties are entitled to costs, I shall proceed to consider, what costs they are respectively entitled to, with the means of taxing and recovering them, as between *party* and *party*.

Where the *plaintiff* recovers *single* damages, he is only entitled to *single* costs, unless more be expressly given him by statute: But if *double* or *treble* damages are given by a statute, subsequent to the statute of *Gloucester*, in a case wherein *single* damages were before recoverable, the plaintiff is entitled to *double* or *treble* costs, although the statute be silent respecting them <sup>r</sup>; as in an action upon the 2 *Hen. IV. c. 11*, &c <sup>s</sup>. In some cases, *double*

<sup>n</sup> Say. Rep. 229. 1 Bur. 603.

<sup>q</sup> 2 Bur. 1021.

Say. Costs, 144. S. C.

<sup>r</sup> Say. Costs, 228.

<sup>o</sup> Say. Rep. 253.

<sup>s</sup> *Ante*, 865

<sup>p</sup> 1 Bur. 604.

*double* and *treble* costs are expressly given to the plaintiff; as upon the game-laws, by the statute 2 *Geo.* III. c. 19. § 5. And wherever a plaintiff is entitled to *double* or *treble* costs, the costs given by the court *de incremento* are to be doubled or trebled, as well as those given by the jury<sup>t</sup>. But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. Where a statute gives *double* costs, they are calculated thus: 1. the common costs; and then *half* the common costs: If *treble* costs, 1. the common costs; 2. half of these; and then half of the latter<sup>u</sup>.

Double or treble costs are also in some cases expressly given to the *defendant*; as in actions against justices of the peace, constables, &c. by the 7 *Jac.* 1. c. 5.<sup>v</sup> (made perpetual by the 21 *Jac.* I. c. 12. § 2.); for distresses for rents and services, by the 11 *Geo.* II. c. 19. § 21, 2.; and against officers of the excise or customs, by the 23 *Geo.* III. c. 70. § 34. and 24 *Geo.* III. sess. 2. c. 47. § 35. In these and similar cases, where it does not appear, on the face of the record, that the defendant is entitled to the benefit of the act, (as where  
he

<sup>t</sup> 2 Leon. 52. Cro. Eliz. 582.      <sup>v</sup> This statute does not extend to actions for a mere *non-feasance*, but only where something is *done* by the officers.  
3 Lev. 351. Carth. 297. 321.      2 Lev. 250. 3 East, 92.  
1 Salk. 205. 1 Ld. Raym. 19.  
S. C. 2 Str. 1048. but see 1  
T. R. 252.

<sup>u</sup> Table of Costs, *in princip.*

he pleads the general issue,) and there is no particular mode appointed for recovery of the costs, the proper mode, after a nonsuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a suggestion on the roll <sup>w</sup>. And it cannot be done by rule of court <sup>x</sup>, unless where the plaintiff moves for leave to discontinue, on payment of costs; in which case, the court may make it part of the rule, that he shall pay double or treble costs <sup>y</sup>. But where a particular mode is appointed by statute, for the recovery of double or treble costs, as by the *certificate* of the judge who tried the cause, on the 7 *Jac.* I. c. 5. there that particular mode must be observed <sup>z</sup>: so that if the judge certify, there is no need of a suggestion; and if he do not, it is of no avail, except where judgment goes by default <sup>a</sup>.

Costs are taxed by the master, upon a bill made out by the attorney for the prevailing party; or more frequently without a bill, upon a view of the proceedings; and if there have been any *extra* expences, which do not appear on the face of the proceedings, there should be an affidavit made of such expences, to warrant the allowance of them; which

<sup>w</sup> 1 Str. 49, 50. Cas. Pr.      <sup>y</sup> 2 Str. 974. Cas. *Temp.*  
C. B. 16. Cas. *Temp.* Hardw.      Hardw. 125.

126. *Id.* 138. 2 Str. 1021. S.      <sup>z</sup> 2 Vent. 45. Doug. 307, 8.  
C. Say. Rep. 214. 3 Wils.      7 T. R. 448. but see Doug.  
442.      308. n.

<sup>x</sup> 1 Str. 50.

<sup>a</sup> Cas. *Temp.* Hardw. 138, 9.

which is called an affidavit of increased costs <sup>b</sup>. It is usual to give notice to the opposite attorney, of the time when the costs are intended to be taxed; but in order to enforce it, there must be a rule to be present at taxing costs <sup>c</sup>: which rule is obtained from the clerk of the rules, and a copy of it should be duly served; after which, if the costs are taxed without notice, the taxation is irregular, and the attorney liable to an attachment.

The means of recovering costs, as between party and party, are by *execution* or *action*, upon a judgment obtained for them; or by *attachment*, upon a rule of court <sup>d</sup>. Thus in *ejectment*, where there is a verdict and judgment against the tenant, execution may be taken out, or an action brought thereon, for the costs <sup>e</sup>: but where the plaintiff is nonsuited, for the defendant's not confessing lease entry and ouster, the lessor of the plaintiff must proceed by attachment, upon the consent-rule <sup>f</sup>. And so where the nominal plaintiff is nonsuited upon the merits, or has a verdict and judgment against him, the only remedy is by attachment, against the lessor of the plaintiff <sup>g</sup>.

In proceeding by *attachment*, a copy of the rule, with the officer's *allocatur* thereon, should be *personally*

<sup>b</sup> Append. Chap. XL. § 3.

<sup>c</sup> *Id.* § 2.

<sup>d</sup> 2 H. Blac. 248.

<sup>e</sup> Run. *Eject.* 415.

<sup>f</sup> *Id. ibid.* 1 Salk. 259.  
Barnes, 182.

<sup>g</sup> Run. *Eject.* 415, 165. *Tilly*  
and *Baily*, Mich. 6 Geo. II.

*sonally*<sup>h</sup> served on the party liable to the payment of costs; and at the same time, the original rule should be shewn to him<sup>i</sup>, and a demand of payment made<sup>k</sup>: And where the costs are ordered to be paid to the attorney, the demand may be by the acting attorney in the cause, although he act in the name of another attorney<sup>l</sup>. And if the costs be not paid, the court, upon an affidavit of the circumstances, will grant an attachment. In this court, the rule for an attachment is absolute in the first instance<sup>m</sup>; and may be moved for on the last day of term<sup>n</sup>.

To assist the parties in the recovery of costs, they are allowed to deduct or set off the costs in one action, against those in another. This practice, however agreeable to natural justice, does not seem to have obtained till lately, in the court of King's Bench<sup>o</sup>: But in the Common Pleas, it has been frequently allowed; and that, not only where the parties have been the *same*<sup>p</sup>, but also where they have been in some measure *different*. Thus, a party has been permitted to set off a *separate* demand, for

<sup>h</sup> 3 T. R. 351. *Pope v. Smith*,  
*per Cur.*

<sup>i</sup> *Id. ibid.*

<sup>k</sup> *Hubbard v. Horton*, H. 36

G. III.

<sup>l</sup> Say. Rep. 95.

<sup>m</sup> *Per Buller*, Just. M. 24  
Geo. III. 1 Bos & Pul. 477.

<sup>n</sup> 5 Bur. 2686.

<sup>o</sup> 2 Str. 891. 1203. Bul. N<sup>o</sup>.  
*Pri.* 336. 4 T. R. 124. 8 T.

R. 69.

<sup>p</sup> Barnes, 145. 2 Blac. Rep.

826. Say. Costs, 256. S. C.

Bul. N<sup>o</sup>. *Pri.* 336. 3 Bos. &

Pul. 28.



for costs payable to himself alone, against a *joint* demand, for costs payable by himself and others <sup>q</sup>: and he has also been permitted to set off a *joint* demand, for costs payable to himself and another, against a *separate* demand, for damages and costs payable by himself only <sup>r</sup>. But where, in an action of trespass against four defendants, the plaintiff obtained a verdict against one, and the other three were acquitted, the court would not suffer the costs of the three defendants, who were acquitted, to be deducted out of the plaintiff's costs, against that defendant who was found guilty; declaring the motion to be unprecedented <sup>s</sup>. And a judgment recovered by A. against B. and C. cannot be set off, on application to the general jurisdiction of the court, against another judgment recovered against A. by the assignees of B. under an insolvent-debtor's act; the interest of third persons intervening, who have peculiar claims by the statute <sup>t</sup>. Where the application is made by the party to whom the *larger* sum is due, the rule is for a stay of proceedings, on acknowledging satisfaction for the *less* sum <sup>u</sup>: But where the *less* sum is

<sup>q</sup> Barnes, 146. but see 336. but see 1 H. Blac. 25.  
Barnes, 130. 217. 657.

<sup>r</sup> Say. Costs, 254. 2 Blac. <sup>t</sup> 3 East, 149.

Rep. 827. S. C. cited; and see <sup>u</sup> Bul. *Ni. Pri.* 336. & T.  
1 H. Blac. 217. 657. R. 69.

<sup>s</sup> Barnes, 145. Bul. *Ni. Pri.*

is due to the party applying, the rule is to have it deducted, and for a stay of proceedings, on payment of the balance <sup>v</sup>.

<sup>v</sup> Say. Costs, 254. and see 4 T. R. 124.

## CHAPTER XL1.

*Of EXECUTION.*

**A**FTER final judgment signed <sup>a</sup>, the plaintiff may in general, at any time within a year and a day, and whilst the parties continue the same, take out execution against the body, lands, or goods of the defendant; provided there be no writ of error depending, or agreement to the contrary <sup>b</sup>.

There are some cases however, in which execution cannot be taken out, without leave of the court; as where, in actions on a policy of assurance, there is a verdict for the plaintiff against one of several underwriters, and the rest have entered into the *consolidation* rule, and agreed to be bound by it <sup>c</sup>. And it seems, that on a writ of error *coram nobis*, execution taken out without leave of the court is irregular <sup>d</sup>. So where in *ejectment*, the landlord is admitted to defend on the tenant's non-appearance, and judgment is thereupon signed against the casual ejector, with a stay of execution till further order, the lessor of the plaintiff having succeeded, must apply to the court for leave to take out execution; and in such case, if a writ of error be brought by the landlord, it

<sup>a</sup> And even before it is entered. Gilb. C. P. 24. Law of Executions, 43. Hardw. 53. *Ante*, 505.

<sup>c</sup> *Ante*, 438, 9. 557.

<sup>d</sup> Say. Rep. 166. Barnes,

<sup>b</sup> 1 Mod. 20. Cas. temp. 201. 2 Blac. Rep. 1067.

it may be shewn for cause, and will be a sufficient reason, against taking out execution<sup>e</sup>: but if the landlord omit the opportunity of shewing it for cause, the execution is regular, and cannot be set aside<sup>f</sup>. Where a verdict is taken *pro formâ* at the trial, for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded must be taken as if it had been originally found by the jury, and the plaintiff is entitled to enter up judgment for the amount, without first applying to the court for leave<sup>g</sup>. But where a verdict is taken, and judgment entered up, for a less sum than is afterwards found due by the award, the plaintiff cannot take out execution for the whole sum awarded, but only for the sum recovered by the judgment; and must proceed for the residue, by action or attachment. *Bonner and Charlton*, E. 43 Geo. III. K. B.

Where several actions are brought against different parties for the same debt, as upon a bail-bond, promissory note, or bill of exchange, each party is liable to an execution for the whole debt, and the costs of the action against himself; but neither of them is liable to the costs of the actions against the other defendants<sup>h</sup>. And in suing out execution in actions upon a bail-bond, we have seen, that it is usual to apportion the debt and costs in the original action, amongst the different defendants, so as to levy a part on each, together with his own costs<sup>i</sup>.

In an action of *debt* on bond for a penalty, the sheriff may be directed to levy the sum secured by the condition, together with the damages and costs recovered by the judgment, and all subsequent costs  
of

<sup>e</sup> 2 Str. 1241.

<sup>f</sup> 2 Bur. 757.

<sup>g</sup> 1 East, 401. 1 Bos. & Pul.  
97. 480. 3 Bos. & Pul. 244.

but see 1 Salk. 84. Barnes, 58.  
*contra*.

<sup>h</sup> *Ante*, 482.

<sup>i</sup> *Ante*, 250.

of the execution, &c.; which direction is usually indorsed on the writ: And by a late act of parliament, (43 Geo. III. c. 46. § 5.) “ in every action in which  
 “ the plaintiff shall be entitled to levy under an execution against the goods of the defendant, such  
 “ plaintiff may also levy the poundage, fees and expenses of the execution, over and above the sum  
 “ recovered by the judgment.” But this clause of the act seems only to apply to cases where the execution is taken out against the goods of the defendant.

The execution following the judgment, is either for the plaintiff, or for the defendant: for the former, upon a judgment in *assumpsit*, *covenant*, *case*, *replevin*, or *trespass*, for the damages and costs, or in *debt*, for the debt damages and costs recovered; to be levied, in an action against an executor or administrator, of the goods of the testator or intestate, in the hands of the defendant, if he hath so much thereof in his hands to be administered, and if not, then the costs, or damages and costs, to be levied *de bonis propriis*<sup>j</sup>. Upon a judgment in *detinue*, the execution is for the goods or their value, with damages and costs. For the *defendant*, upon a judgment in *replevin* at common law, the execution is for a return of the goods; or upon the statute 17 Car. II. c. 7. for the arrearages of rent and costs: and in other actions, upon a judgment of *non-pros*, nonsuit or verdict, it is for the costs only.

To obtain execution of the damages, or debt damages and costs recovered, or the costs only, there are four different species of writs: first, a *fieri facias*, against the goods; secondly, an *elegit*, against the goods, and a moiety of the lands; thirdly, an *extendi facias*, or *extent*, against the whole of the lands, or  
 in

<sup>j</sup> Cro. Eliz. 887. Dyer, 185 (b). Append. Chap. XLI. § 6. 11.



in some cases, against the body lands and goods; fourthly, a *capias ad satisfaciendum* against the person. These are judicial writs, issuing out of the court where the record is, upon which they are grounded; and therefore when a record is removed here from a county-palatine, or other court, by writ of error, and the plaintiff is nonprossed, this court will award execution<sup>k</sup>. So if proceedings are removed out of the county court, or other court not of record, by writ of false judgment, and the plaintiff is nonprossed, the execution shall issue out of the court above<sup>l</sup>: but in the latter case, a *scire facias* seems to be necessary<sup>m</sup>.

The plaintiff having sued out one writ of execution, may, before it is executed, abandon that writ, and sue out another of a *different* sort: Or he may have several writs, of the *same* sort, running against the defendant or his goods at the same time, in different counties. But after the execution of one writ, the plaintiff cannot sue out or proceed upon another, of the same or a different sort, until that which has been executed is returned; and then, if a part only be levied upon a *fieri facias*, the plaintiff may have an *alias fieri facias*, or other execution for the remainder; or if the *capias ad satisfaciendum* be rendered ineffectual, by the death or escape of the defendant, the plaintiff may have a new writ

<sup>k</sup> 3 T. R. 657. and see the statutes 19 G. III. c. 70. 33 G. III. c. 68.

<sup>l</sup> Bro. Abr. tit. *Executions*.

112. tit. *Faux-judgment*, 6.

<sup>m</sup> *Id.* Bro. Brev. *Jud.* 206. 318. 320.

writ for the whole: And he may sue out and execute several *elegits*, for lands in different counties.

A *fiery facias* is a common-law execution; and, except in a county palatine, is directed to the sheriff of the county where the action is laid<sup>n</sup>, commanding him that of the goods and chattels of the defendant, in his bailiwick, he cause to be made, or levied, the sum recovered, and have it before the king at *Westminster*, (by bill, or by original, *wheresoever*, &c.) on the return-day<sup>o</sup>. In point of form, it should invariably pursue the judgment; and therefore it has been holden, that a special execution is not warranted by a general judgment<sup>p</sup>.

This writ should be *tested* in term-time<sup>q</sup>, on a day after the judgment is, or may be supposed to have been given: And as the judgment relates in law to the first day of the term wherein it is signed, it seems that the *fiery facias* may be tested on any day  
in

<sup>n</sup> A writ of *fiery facias* directed in the first instance to the bailiff of the *isle of Ely*, out of this court, is erroneous and void; and the bailiff is guilty of a trespass in executing it. 3 East, 128.

<sup>o</sup> For the forms of the writ of *fiery facias* for the *plaintiff*, in *assumpsit*, see Append.

Chap. XLI. § 1, &c. in *debt*, *id.* § 7, &c. in *detinue*, *id.* § 9. in *covenant*, *id.* § 12. in *case*, *id.* § 13, &c. in *replevin*, *id.* § 16. in *trespass*, *id.* § 17, &c. and for the *defendant*, on a *nonpros*, &c. *id.* § 25, &c.

<sup>p</sup> 1 T. R. 80. and see 6 T. R. 525. 7 T. R. 27.  
<sup>q</sup> 2 Salk. 700.

in that term<sup>r</sup>; and it should be made returnable in term-time, on a day certain by bill, or by original, on a general return-day. If it be tested<sup>s</sup> or returnable<sup>t</sup> out of term, or in an action by bill, if it be returnable on a general return-day<sup>u</sup>, it is void, or at least erroneous; and may be quashed or set aside on motion, together with the proceedings that have been had under it. A writ of *feri facias* must be signed, as well as sealed<sup>v</sup>; and may be amended, by adding or altering the teste or return<sup>w</sup>.

At common law, the *feri facias* had relation to its *teste*, and bound the defendant's goods from that time; so that if the defendant had afterwards sold the goods, though *bonâ fide* and for a valuable consideration, they were still liable to be taken in execution, into whose hands soever they came<sup>x</sup>. This relation being productive of great mischief to purchasers, was taken away by the statute 29 *Car. II.* c. 3. § 16. which enacts "that no writ of *feri facias*, or other writ of execution, shall bind the property of the goods of the party, against whom such writ of execution is sued forth, but from the  
" time

<sup>r</sup> 1 *Crompt.* 372.

<sup>s</sup> 2 *Salk.* 700.

<sup>t</sup> *Davey v. Hollingsworth*  
and another, T. 24 *Geo. III.*  
K. B.

<sup>u</sup> 1 *Wils.* 155.

<sup>v</sup> *R. E.* 1659.

<sup>w</sup> *Say. Rep.* 12. *Davey v.*  
*Hollingsworth* and another, T.  
24 *Geo. III.* K. B.

<sup>x</sup> *Gilb. Exec.* 13, 14. 8 *Co.*  
171. *Cro. Eliz.* 174. 440. *Cro.*  
*Car.* 149. 2 *Vent.* 218. 7 *T.*  
*R.* 21, 2. but see 1 *Lev.* 174.

“time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall upon the receipt of any such writ, (without fee for doing the same,) indorse upon the back thereof, the day of the month or year whereon he or they received the same.” But neither before this statute, nor since, is the property of goods *altered*, but continues in the defendant, till execution executed. The meaning of these words, “that no writ of execution shall bind the property, but from the delivery of the writ to the sheriff” is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market-overt, the sheriff may take them in execution<sup>y</sup>.

This statute, being made in favour of purchasers, does not alter the law as between the parties: therefore, if the execution be tested in the defendant’s life-time, it may be taken out<sup>z</sup> and executed<sup>a</sup> after his death. And the sheriff deriving his

<sup>y</sup> 2 Eq. Cas. Abr. 381. and 20. 1 Bos. and Pul. 571. *Aliter*, see 1 Ld. Raym. 252. if the execution be tested after

<sup>z</sup> 1 Ld. Raym. 695. Com. the defendant’s death. 6 T. Rep. 117. Bunb. 271. 12 Mod. R. 368.

<sup>a</sup> 2 Ld. Raym. 350. 7 Mod. a Gilb. *Exec.* 15, 16. Law 95. S. C. and see 3 P. Wms. of *Exec.* 46. Cro. Eliz. 181. 399. and the case of *Finch v.* 1 Mod. 188. Comb. 33. Pr. the earl of *Winchelsea*, *id. in* Reg. 215. 7 T. R. 20. *notis.* Willes, 131. 7 T. R.

his authority from the writ, it has been holden, that if the plaintiff die, after a *feri facias* sued out, it may be executed notwithstanding; and his executor or administrator shall have the money<sup>b</sup>: Or if the plaintiff has made no executor, or administration is not committed, the money must be brought into court, and there deposited, until &c<sup>c</sup>.

The *king* is not bound by this statute<sup>d</sup>: And therefore an *extent* at his suit, still binds from the teste, or *fiat* of the baron on which it issues<sup>e</sup>. And as between *different* plaintiffs, if two writs of execution are delivered to the sheriff on the same day, he ought to execute that first which was first delivered<sup>f</sup>, except it be fraudulent, and then he ought to execute the other<sup>g</sup>; and the court on motion will not assist the plaintiff in the second execution<sup>h</sup>. But if the sheriff levy goods in execution, by virtue of the writ last delivered, and make sale of them, whether the last writ was delivered upon the same or a subsequent day, the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered;

<sup>b</sup> Cro. Car. 459. 1 Sid. 29. 222. 2 Str. 754. S. C. 2  
2 Ld. Raym. 1073. 1 Salk. Blac. Rep. 1251.  
322. S. C. <sup>f</sup> 1 T. R. 729.

<sup>c</sup> Noy, 73. 2 Ld. Raym. <sup>g</sup> 1 Wils. 44. and see Peake  
1073. Cas. *Ni. Pri.* 66.

<sup>d</sup> 3 Atk. 739. 1 Vez. 196. <sup>h</sup> 1 T. R. 729.

<sup>e</sup> Bunb. 39. Gilb. Rep.



vered; but he may have his remedy against the sheriff<sup>i</sup>.

By this writ, the sheriff has authority to seize and sell every thing that is a chattel, belonging to the defendant<sup>j</sup>, except his necessary wearing apparel: It has even been holden, that if the defendant have two gowns, the sheriff may sell one of them<sup>k</sup>. And he may sell leases or terms for years, and *fructus industriales*, as corn growing, which goes to the executor<sup>l</sup>; or fixtures which may be removed by the tenant<sup>m</sup>: but furnaces, or apples upon trees, which belong to the freehold, and go to the heir, cannot be sold by the sheriff on this writ<sup>n</sup>. Money in the sheriff's hands, belonging to the defendant, may be taken in execution<sup>o</sup>: But the sheriff cannot take bank-notes<sup>p</sup>, &c. nor goods pawned, or gaged for debt; nor goods demised or letten for years; nor goods distrained<sup>q</sup>, or taken and in custody of the sheriff upon a former execution<sup>r</sup>; nor any thing which cannot be sold, as deeds, writings<sup>s</sup>, &c.

In

<sup>i</sup> 1 Ld. Raym. 252. 1 Salk. 320. Carth. 419. S. C. and see the case of *Rybot v. Peckham*,

1 T. R. 731. *in notis*.

<sup>j</sup> Gilb. *Exec.* 19. 3 Co. 12.

<sup>k</sup> Comb. 356.

<sup>l</sup> Gilb. *Exec.* 19.

<sup>m</sup> 1 Salk. 368. 3 Atk. 13.

<sup>n</sup> Gilb. *Exec.* 19.

<sup>o</sup> Doug. 231.

<sup>p</sup> Cas. *tempt.* Hardw. 53.

<sup>q</sup> Bac. Abr. tit. *Exec.* 352.

and see Willes, 131.

<sup>r</sup> Show. 173. 3 Mod. 236.

<sup>s</sup> Cas. *tempt.* Hardw. 53.

In assigning a term for years, which has been taken in execution, it is not necessary for the sheriff to state in the assignment, the particular interest which the defendant has, for he may not be able to come at the precise knowledge of it; but it is sufficient for him to state, that the defendant is possessed of the premises for a term of years, *yet to come and unexpired*, and to assign all his interest therein generally<sup>t</sup>; and it is more prudent in the sheriff to state the interest in this way, for if he attempt to state it particularly and fail, the vendee will not have a good title<sup>u</sup>. It is said, that if a sheriff, on a *feri facias*, sell a lease or term of an house, he cannot legally put the party out of possession, and the vendee in; but the vendee must bring his ejectment<sup>v</sup>. This however must be understood of a *forcible* expulsion; for it has been determined, that under a *feri facias*, the sheriff may justify expelling the defendant *peaceably*<sup>w</sup>, or in other words, if the defendant will consent to go out, the sheriff may put the vendee in possession. If the defendant, subsequent to the delivery of the writ to the sheriff, make an assignment of a leasehold estate, the judgment-creditor need not bring a suit in equity to come at the estate, by setting aside the assignment; but may proceed at law to sell the term,

<sup>t</sup> 4 Co. 74. Cro. Eliz. 584.  
S. C.

<sup>v</sup> 2 Show. 85.

<sup>w</sup> 3 T. R. 292.

<sup>u</sup> *Id. ibid.* 3 T. R. 294.

term, and the vendee, who is generally a friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment <sup>x</sup>. Where the defendant has only an equity of redemption, in a leasehold estate, it seems that an execution will not affect it, as the legal estate is in the mortgagee <sup>y</sup>: The plaintiff's only remedy in that case, is by filing a bill in equity, to redeem the estate, by paying off the principal and interest due on the mortgage <sup>y</sup>.

The sheriff, upon this writ, may take any goods which have been fraudulently sold, or conveyed away by the defendant; and a principal badge of fraud is the defendant's continuing in possession <sup>z</sup>: For if a man sell goods, and still continue in possession, as visible owner of them, such sale is fraudulent and void as against creditors <sup>a</sup>. So if a creditor by *fieri facias* seize the goods of his debtor, and suffer them to remain long in the debtor's hands, and another creditor obtain a subsequent judgment and execution, it has been determined often, that this is evidence of fraud in the first creditor, and the goods in the hands of the

<sup>x</sup> 3 Atk. 739.

<sup>y</sup> *Id. ibid.*

<sup>z</sup> Gilb. *Exec.* 15. and see

*Twine's case*, 3 Co. 81.

Godb. 161. 1 Esp. Cas. 17.

*Pri.* 205. 357, 8. 8 T. R.

82. 521. but see 2 Bos. &

Pul. 59. 3 Esp. Cas. *Ni. Pri.*

52. S. C.

<sup>a</sup> *Prec. in Chan.* 286, 7.

the debtor remain liable<sup>b</sup>. So where it was proved, in an action for a false return, that the warrant upon a *fieri facias* was directed to three persons, as special bailiffs; that the plaintiff's attorney was present at the time of executing it, and ordered one of the persons to use the defendant kindly, and not to take any of his household goods, for that his landlord would soon be in the country, and pay the debt; and thereupon another of the persons rode round the farm and grounds, and said, "*I seize all this corn and cattle,*" and took some account thereof, for the use of the plaintiff; afterwards, the landlord sued out a *fieri facias*, and the sheriff's bailiffs not being in possession of the goods, under the former writ, nor having left any body for them, he got his execution executed; and there was no proof that he promised to pay the plaintiff; it was left to the jury, upon this evidence, whether the first execution was intended to be, or was really executed; and the jury thought it was not, and gave a verdict for the sheriff, which was afterwards confirmed by the court, on a motion for a new trial<sup>c</sup>.

But if the defendant sell his goods *bonâ fide*, and for a valuable consideration, before the delivery of the writ to the sheriff, they cannot be taken in execution; and though he sell them fraudulently, yet

<sup>b</sup> Prec. in Chan. 286, 7.

<sup>c</sup> 1 Wils. 44.

1 Vez. 245. 456.

yet if they be afterwards sold to another, *bonâ fide*, they are not liable to be taken in the hands of the second vendee<sup>d</sup>. And if *A*, indebted to *B*. and *C*, after being sued to judgment and execution by *B*, go to *C*. and voluntarily give him a warrant of attorney to confess judgment, on which judgment is immediately entered, and execution levied on the same day on which *B*. would have been intitled to execution, and had threatened to sue it out; the preference so given by *A*. to *C*. is not unlawful nor fraudulent, within the meaning of the statute 13 *Eliz.* c. 5<sup>e</sup>.

In an action against one of two *partners*, the sheriff must seize all their joint property, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner<sup>f</sup>.\*

On a *fieri facias*, the sheriff is bound at his peril to take only the goods of the defendant: and therefore if he take the goods of a third person, though the plaintiff assure him they are the defendant's, he is a trespasser; for he is obliged at his peril to take notice whose the goods are. And if he

<sup>d</sup> Godb. 161.

Rep. 277. Cowp. 449. Doug.

<sup>e</sup> 5 T. R. 235.

650. 1 East, 367. 3 Bos. &

<sup>f</sup> 1 Salk. 392. and see 2 Ld. Pul. 254.

Raym. 871. Comb. 217. Com.

\* *From the Addenda to the London edition.* "In such case, the court of common pleas will not, at the request of the partnership creditors, give the sheriff time to return the writ, until an account can be taken of the several claims upon the partnership property. 3 Bos. & Pul. 288. And a *fieri facias* having issued against the effects of the defendant, who was jointly concerned in a manufactory with other persons, to whom he was indebted to a greater amount than his whole share, and the sheriff having seized the whole of the partnership property, that court refused to refer it to the prothonotary, to inquire what was the defendant's interest in the effects seized." 3 Bos. & Pul. 289.



he doubt whether the goods shewn him are the defendant's, he may summon a jury, *de bene esse*, to satisfy himself<sup>g</sup>: This will justify the sheriff in returning, if it be so found, that the defendant has no goods within his bailiwick; or if it be found that he has, will mitigate damages in an action of *trespass*, provided the goods should afterwards turn out not to be the defendant's. And as this is not a proceeding immediately from the court, but merely to indemnify the sheriff in making his return to the writ, the court will not set aside the inquisition of a jury, summoned by the sheriff to inquire in whom the property of goods seized by him under a *fiery facias* is vested<sup>h</sup>.

As the sheriff cannot take the goods of a third person, so if the defendant become *bankrupt*, before the delivery of the writ to the sheriff, or as it should seem, before it is actually executed<sup>i</sup>, the sheriff cannot legally take or dispose of them, after notice of the act of bankruptcy, and of a commission sued out or docket struck: For, *per Holt Ch. J.* "if a writ of execution be delivered to the sheriff against *A.* who becomes bankrupt before it is executed, the execution is superseded; consequently, the property of the goods is not absolutely bound  
by

<sup>g</sup> Dalt. Sher. 146. Gilb. R. 177.

*Exec.* 21. Bac. Abr. tit. *Exec.* <sup>h</sup> 6 T. R. 88.

352. 4 T. R. 633. 648. 7 T. <sup>i</sup> 1 Lev. 173, 4.

by the delivery of the writ to the sheriff<sup>j</sup>." But if the sheriff seize and sell the goods, before he has notice of an act of bankruptcy, &c. he is excused<sup>k</sup>; and if he sell them after such notice, though he may be sued in *trover*<sup>l</sup>, yet he is not liable to an action of *trespass*<sup>m</sup>. An execution against the goods of a bankrupt, taken out after his certificate is signed, but before it is allowed, is valid<sup>n</sup>: And where a defendant was taken in execution, under similar circumstances, and paid the debt and costs to the sheriff, the court on application refused to relieve him. But if a *fiery facias*, issued against a bankrupt before his certificate obtained, be not executed till after, the court will order the goods to be restored, even though he has not pleaded the certificate<sup>p</sup>: and if any thing be alleged to invalidate the effect of the certificate, the court will direct a trial on a plea of bankruptcy<sup>q</sup>.

On a *fiery facias* against a husband, it seems that the sheriff cannot take in execution goods vested in trustees before marriage, for the benefit of the wife<sup>r</sup>.  
And

<sup>j</sup> 1 Ld. Raym. 252. and see  
2 Eq. Cas. Abr. 381.

<sup>k</sup> 1 Blac. Rep. 205. 2 Blac.  
Rep. 829. S. P.

<sup>l</sup> 1 Burr. 20. 1 Blac. Rep.  
65. S. C.

<sup>m</sup> 1 T. R. 475.

<sup>n</sup> *Id.* 361. and see 1 Blac.  
Rep. 400.

<sup>o</sup> *Neatly and Eagleton*, E. 24  
Geo. III. K. B.

<sup>p</sup> 1 Bos. & Pul. 427.

<sup>q</sup> *Id. ibid.*

<sup>r</sup> Cowp. 432. 3 T. R.  
618. and see Co. Lit. 351. a.  
n. 1. but see 2 Vern. 239. 4  
T. R. 638, 9. 8 T. R. 82.  
521.

And it has been determined at *nisi prius*, that the mere possession of goods is not sufficient to subject them to an execution, issued against the party possessing them, if it be satisfactorily proved that they were really and *bonâ fide* sold to a third person, as a trustee for his wife, and possession taken by such third person <sup>s</sup>.

On a *feri facias* against an *executor*, for his own debt, the goods of the testator, in the hands of the defendant, cannot be taken in execution <sup>t</sup>. But if an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt <sup>u</sup>.

The sheriff, upon a *feri facias*, cannot justify breaking open the *outer* door of a dwelling-house <sup>v</sup>; but if that be open, he may, after demanding and being refused admittance, break open an inner door <sup>w</sup>: And as goods may be distrained, so it seems they may be taken in execution, through the windows, if open <sup>x</sup>. When the officers are once in the house, they may break open any chamber-doors, or trunks, for executing the writ <sup>y</sup>. A seizure of part of the goods in a house, by virtue of a *feri facias*, in the name of the whole, is a good seizure

<sup>s</sup> 2 Esp. Cas. *Ni. Pri.* 574. 5 Co. 93. Gilb. *Exec.* 17, 18.

<sup>t</sup> 4 T. R. 621.

Cowp. 1.

<sup>u</sup> 1 Bos. & Pul. 293. 2

<sup>w</sup> Comb. 17.

Esp. Cas. *Ni. Pri.* 657. S. C.

<sup>x</sup> 1 Rol. Abr. 671.

<sup>v</sup> 18 Ed. IV. 4. pl. 19.

<sup>y</sup> 2 Show. 87.

seizure of all <sup>2</sup>: And the sheriff, by the seizure, has such a property in the goods, that he may maintain *trespass* or *trover*, against the defendant or a third person, for taking them away <sup>3</sup>. And he may sell them after the return of the writ, and even after he is out of office, without a *venditioni exponas* <sup>b</sup>.

But, before the removal of the goods, the sheriff should take care, if the defendant be tenant of the premises on which the goods are taken, that the landlord is satisfied what, if any thing, is due to him, not exceeding a year's rent. For by the statute 8 *Ann.* c. 14. § 1. “no goods or chattels whatsoever, “lying or being in or upon any messuage, lands or “tenements, which are or shall be leased for life or “lives, term of years, at will, or otherwise, shall be “liable to be taken by virtue of any execution, on “any pretence whatsoever, unless the party, at whose “suit the said execution is sued out, shall before the “removal of such goods from off the said premises, “by virtue of such execution or extent, pay to the “landlord of the said premises, or his bailiff, all “such sum or sums of money, as are or shall “be due for rent for the said premises, at the “time of the taking such goods or chattels, by “virtue of such execution, provided the said ar-  
“rears

<sup>2</sup> 2 *Ld. Raym.* 725.

<sup>b</sup> *Cro. Jac.* 73. *Yelv.* 44.

<sup>a</sup> *Gilb. Exec.* 15. 2 *Saund. S. C.* 1 *Salk.* 323. 1 *Vez.*

47. 2 *Ld. Raym.* 1073.

196.

“rears of rent do not amount to more than one year’s  
 “rent; and in case the said arrears shall exceed one  
 “year’s rent, then the said party, at whose suit such  
 “execution is sued out, paying the said landlord or  
 “his bailiff one year’s rent, may proceed to execute  
 “his judgment, as he might have done before the  
 “making of this act; and the sheriff, or other officer,  
 “is thereby empowered and required to levy, and  
 “pay to the plaintiff, as well the money so paid for  
 “rent, as the execution-money.”

“Provided always, that nothing in this act con-  
 “tained shall extend, or be construed to extend, to  
 “let, hinder or prejudice her majesty, her heirs or  
 “successors, in the levying, recovering, or seizing  
 “any debts, fines, penalties or forfeitures, that are or  
 “shall be due, payable or answerable to her said  
 “majesty,” &c.<sup>c</sup>

This statute extends to all manner of execu-  
 tions for the subject, upon judgments for the de-  
 fendant as well as the plaintiff<sup>d</sup>; and the landlord  
 is intitled to his whole rent, without deduction  
 of poundage<sup>e</sup>. But after he has had one year’s rent  
 paid him, he is not intitled to another, upon a se-  
 cond execution<sup>f</sup>; and the ground-landlord is not  
 within the act, where there is an execution against  
 the

<sup>c</sup> § 8. and see Bunb. 5. 269.

<sup>e</sup> 1 Str. 643.

<sup>d</sup> 2 Wils. 140.

<sup>f</sup> 2 Str. 1024.



the under-lessee<sup>g</sup>. The goods of a tenant are liable to a year's rent, notwithstanding an outlawry in a civil suit<sup>h</sup>. And where a sheriff's officer, being in possession of the tenant's effects under an outlawry, made a distress for rent, and sold the goods so distrained, and afterwards the outlawry was reversed; it was ruled, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received<sup>h</sup>. But a commission of bankrupt is not considered as an execution within this statute; and as the landlord, on the one hand, may distrain for his whole rent, even after an assignment and sale by the assignees, before the goods are removed off the premises; so, on the other hand, if he suffer the goods to be removed, without distraining, he must in general come in for his rent *pro rata* with the other creditors<sup>i</sup>. If the sheriff remove the goods, without satisfying the landlord, he is liable to an action, which may be brought by the executor or administrator of the landlord<sup>k</sup>; but in order to maintain an action, there must be a demand made of the rent, before the goods are removed<sup>l</sup>: Or, instead of bringing an action, the landlord may move the court, that he may be paid what is due to him, out of the money levied, if sufficient for the purpose, or otherwise so much as it will satisfy<sup>m</sup>.

On

<sup>g</sup> 2 Str. 787.

<sup>h</sup> 7 T. R. 259.

<sup>i</sup> 1 Atk. 103, 4.

<sup>k</sup> 1 Str. 212.

<sup>l</sup> *Id.* 97.

<sup>m</sup> Cas. temp. Hardw. 255.

<sup>2</sup> Wils. 140. 1 Crompt. 381.

Willes, 377. Barnes, 199, 211.

On the return-day of the *feri facias*, the sheriff may be called upon by rule, to return the writ; and if he do not return it, or offer a reasonable excuse, the court will grant an attachment against him. But if the property of the goods be disputed, which frequently happens on a commission of bankrupt, &c. the court, on the suggestion of a reasonable doubt, will enlarge the time for the sheriff's making his return, till the right be tried between the contending parties, or one of them has given him a sufficient indemnity. And accordingly in a late case, the court, upon the application of the sheriff, enlarged the time for his making a return to a writ of *feri facias*, upon suggestion of a reasonable doubt, whether the goods seized under the writ were not covered by an *extent*, afterwards issued at the suit of the crown for malt-duties, for the purpose of inducing the plaintiff to go into the court of Exchequer, and there contest the question of right with the crown, in a more eligible manner than in this court<sup>n</sup>.

The returns, commonly made by the sheriff to a *feri facias* are first, *nulla bona*<sup>o</sup>, which is either general, that the defendant has no goods in his bailiwick, whereof he can cause to be made the sum directed to be levied, or any part thereof; or special, with this addition, that the defendant is a  
bene-

<sup>n</sup> 7 T. R. 174. and see 1      <sup>o</sup> Append. Chap. XII. §  
East, 338. 3 Bos. & Pul. 288. 33. 35.

beneficed clerk, having no lay fee within his bailiwick <sup>p</sup>; or, being an executor or administrator, that he has wasted the goods of the testator or intestate <sup>q</sup>; secondly, *fieri feci*, or that the sheriff has caused to be made, of the defendant's goods, the whole or a part of the money, which he has ready to be paid to the plaintiff; thirdly, that he has taken goods of the defendant, to a certain amount, which remain in his hands for want of buyers <sup>s</sup>; or fourthly, that he has made his mandate to the bailiff of a liberty, who has given him no answer, or returned *nulla bona*, &c. <sup>t</sup>.

If the sheriff return, on a *fieri facias*, that the defendant has no goods in his bailiwick, the plaintiff, if it be true, may have an *alias fieri facias* <sup>u</sup>, and after that, if necessary, a *pluries* <sup>v</sup> into the same county; or he may have a *testatum fieri facias* into a different county, suggesting that the defendant has goods there <sup>w</sup>: And a *testatum* may be awarded into *Wales*, or a county *palatine* <sup>x</sup>. In any of these writs, there may be a clause of *non omittas* <sup>y</sup>; commanding the sheriff, that he do not omit, on account

<sup>p</sup> Append. Chap. XLI. § 34.

<sup>q</sup> *Thes. Brev.* 116, 17. Append. Chap. XLI. § 36.

<sup>r</sup> Append. Chap. XLI. § 37, &c.

<sup>s</sup> *Id.* § 42, 3.

<sup>t</sup> *Id.* § 38. 41.

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<sup>u</sup> *Id.* § 44.

<sup>v</sup> *Id. ibid.*

<sup>w</sup> *Id.* § 46. 48, &c.

<sup>x</sup> Cro. Jac. 484. and see 1 Lev. 256. 291. T. Raym, 206.

<sup>2</sup> Saund. 193. R. H. 19 Jac. I.

<sup>y</sup> Append. Chap. XLI. § 45.

2 M

count of any liberty in his county, but that he enter the same, &c. If the return be not true, the plaintiff may maintain an action against the sheriff for a false return. And where the sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property of the goods in him or the plaintiff; but they remain in the defendant, and are liable to a subsequent execution for his debt <sup>z</sup>.

The plaintiff cannot regularly sue out a *feri facias*, into a different county from that where the action is laid, without a *testatum* <sup>a</sup>; nor a *testatum* without a previous *feri facias* <sup>b</sup>. But the award of a *testatum* on the roll, is sufficient to warrant a *feri facias* into a different county <sup>c</sup>; or if a *feri facias* be sued out into one county, when it should have been a *testatum*, without any original *feri facias*, and the plaintiff afterwards sue out an original *feri facias*, the court will permit the party to amend the former, on payment of costs <sup>d</sup>; and they will not set aside a *testatum*, sued out without an original *feri facias* to warrant it, if the plaintiff afterwards sue out such original *feri facias*, and

<sup>z</sup> 2 Vern. 239.

<sup>a</sup> 2 Blac. Rep. 694. *Palter* and *Ellison*, H. 25 Geo. III. K. B. 3 T. R. 657.

<sup>b</sup> 3 T. R. 388.

<sup>c</sup> Barnes, 196, 7. and see Prac. Reg. 210. 12. It is not

sufficient however, to verify the fact of an original *feri facias* having been awarded, by affidavit; but the plaintiff ought to have the roll in court. *Per Cur.* M. 42 G. III.

<sup>d</sup> 3 T. R. 657.

and get it returned and filed, so as to be able to produce it on shewing cause<sup>e</sup>, though a writ of error has been previously brought<sup>f</sup>. So where the record was produced in court, on which an original *capias ad satisfaciendum* was entered, with the sheriff's return thereto, the court permitted the plaintiff to sue out and seal an original *capias ad satisfaciendum*, to warrant a *testatum* into a different county<sup>g</sup>. And it is said, that the *feri facias* on which the *testatum* is founded, is returned of course by the attornies themselves, as originals are<sup>h</sup>. In all continued writs, the *alias* or *testatum* must be tested the day the former was returnable<sup>i</sup>; and if a *feri facias* issue to the sheriff, returnable on a general return-day, and he at that day return *nulla bona*, a *testatum fieri facias* may issue on the day following, and execution thereon will be good; for though, on mesne-process, there can be no *testatum*, till the *quarto die post*, yet it is otherwise in writs of execution, for on these the party has no day in court<sup>j</sup>.

If the sheriff return *nulla bona*, and that the defendant is a beneficed clerk, having no lay fee, there goes a *levari facias* to the bishop of the diocese wherein the benefice is, commanding him to le-

vy

<sup>e</sup> 2 Salk. 589, 90. Barnes,  
200, 201. 208, 9. 11. 3 T. R.  
388. 657.

<sup>f</sup> 5 T. R. 272.

<sup>g</sup> 6 T. R. 450.

<sup>h</sup> 2 Salk. 590.

<sup>i</sup> *Id.* 699.

<sup>j</sup> T. Jon. 200.



vy the sum recovered, of the *ecclesiastical* goods and chattels of the defendant<sup>k</sup>. This writ is similar to a *feri facias*; and the bishop, who is in nature of a temporal officer or ecclesiastical sheriff, may seize and sell the profits of the benefice<sup>l</sup>: But he must return *feri feci*, and not *sequestrari feci*, upon this writ<sup>m</sup>. He may also, like the sheriff, be called on by rule to return the writ; and if he make a false return, will be liable to an action<sup>n</sup>. Upon this writ, the bishop or his officer makes out a *sequestration*, directed to the churchwardens, or upon a proper security, to persons of the plaintiff's own appointment, requiring them to sequester the tithes, and other profits of the benefice<sup>o</sup>; which sequestration should be forthwith duly published, by reading it in church during divine service, and afterwards at the church-door, and fixing a copy thereon: for where a sequestration was made out, and not published while the writ was in force, but was stayed in the register's hands, by desire of the plaintiff's attorney, the court held, that it had no priority, as against other sequestrations, afterwards made out and duly published; but that if it had been published, the execution would have taken effect,

<sup>k</sup> Gilb. *Exec.* 26. Bac. Abr. tit. *Exec.* 360. Append. Chap. XLI. § 51, &c.

<sup>l</sup> 2 Mod. 257, 8.

<sup>m</sup> 1 Str. 87.

<sup>n</sup> Gilb. *Exec.* 26. and see

1 Salk. 320. 1 Ld. Raym. 265. S. C.

<sup>o</sup> Burn, *Eccles. Law*, tit. *Sequestration*, 3 V. 317. Append. Chap. XLI. § 56.

effect, and must have been first satisfied, notwithstanding it was then returnable<sup>p</sup>. It is said, that this writ of sequestration must be renewed every term<sup>q</sup>; but it seems, that if the writ be laid and executed, before the day of the return, the mesne profits may be taken under it, after the writ is returnable, otherwise not<sup>r</sup>.

In an action against an *executor* or *administrator*, if the sheriff return *nulla bona* to the *fieri facias*, the plaintiff must proceed by *scire fieri* inquiry<sup>s</sup>, or action of *debt* upon the judgment, suggesting a *devastavit*: but if a *devastavit* be returned by the sheriff, the plaintiff may have execution immediately against the defendant, by *capias ad satisfaciendum*<sup>t</sup>, or *fieri facias de bonis propriis*<sup>u</sup>.

If *fieri feci* be returned, the plaintiff may proceed against the sheriff for the money, by rule of court, or action of *debt* founded on his return; or, though no return be made, an action of *debt*, *account* or *assumpsit*, will still lie against the sheriff, or his executors, for the money levied<sup>v</sup>: And in such an action, the defendant cannot plead the statute of limitations;

<sup>p</sup> *Legassicke v. Bishop of Exeter*, E. 22 Geo. III. K. B. 1 Cromp. 359.

<sup>q</sup> 1 Cromp. 345. Wood's Inst. 608, 9.

<sup>r</sup> Burn, *Eccles. Law*, tit. *Sequestration*, 3 V. 317.

<sup>s</sup> Lil. Ent. 664. Append.

Chap. XLII. § 47.

<sup>t</sup> Append. Chap. XLI. § 103, &c.

<sup>u</sup> *Thes. Brev.* 46, 7. 122. 125. Append. Chap. XLI. § 57, 8.

<sup>v</sup> Cro. Car. 539. 2 Show. 79. 281. Gilb. *Exec.* 25.

mitations; for though, till the writ be returned, it is not a matter of record, yet it is founded upon a record, and has a strong relation to it <sup>w</sup>. If a part of the money only be levied, the plaintiff may have a *feri facias* for the residue<sup>x</sup>; and the first writ must be returned, before a second execution can be taken out; for that must be grounded on the first writ, and recite that all the money was not levied thereon: But if upon the first, all the money had been levied, the writ need not have been returned, for no further process was necessary <sup>y</sup>: And if nothing be levied on the first writ, it need not be recited in the second.

If the sheriff return, that he has taken goods, which remain in his hands for want of buyers, the plaintiff may sue out a writ of *venditioni exponas*, reciting the former writ and return, and commanding the sheriff to expose the goods to sale, and have the monies arising therefrom in court, at the return of it <sup>z</sup>. If goods are not taken to the value of the whole, the plaintiff may have a *venditioni exponas* for part, and a *feri facias* for the residue, in the same writ <sup>a</sup>; and it seems, that a *venditioni exponas* may be directed to the new sheriff, where  
the

<sup>w</sup> 2 Show. 79.

<sup>z</sup> Append. Chap. XLI. § 64.

<sup>x</sup> Append. Chap. XLI. § 59, &c.

Cowp. 406. but see 1 Bos. & Pul. 359.

<sup>y</sup> 1 Salk. 318. Gilb. *Exec.* 26.

<sup>a</sup> *Thes. Brev.* 305. Append. Chap. XLI. § 65.

the old one returns, that he has taken goods, which remain in his hands for want of buyers<sup>b</sup>. But the more usual way of proceeding, in such case, is by writ of *distringas* to the new sheriff, commanding him to distrain the old one, till he sell the goods<sup>c</sup>, &c. Of this writ there are two sorts; the first, which is the more ancient, commands the sheriff, to whom it is directed, to distrain the late sheriff, so that he expose the goods to sale<sup>d</sup>, and cause the monies arising therefrom to be delivered to the present sheriff, in order that such sheriff may have those monies in court, at the return<sup>e</sup>: The other writ, which is the most usual<sup>f</sup>, is to distrain the late sheriff, to sell the goods, and have the money in court himself<sup>g</sup>.

If the writ of *fieri facias*, &c. be irregular, the defendant may move the court to set it aside, and that the goods or money levied may be restored to him. A third person, whose goods are taken under it, may also move the court, to have them restored. But if the right be not clear, the court will leave him to his action against the sheriff; or they will sometimes direct an issue for trying it, and retain

<sup>b</sup> 2 Saund. 343.

<sup>f</sup> 6 Mod. 299.

<sup>c</sup> Append. Chap. XLI. § 66,  
&c.

<sup>g</sup> Rast. 164. *Thes. Brev.* 90.

*Off. Brev.* 45. Append. Chap.

<sup>d</sup> Gilb. *Exec.* 21.

XLI. § 66, &c. 2 Ld. Raym.

<sup>e</sup> 34 Hen. VI. 36.

1074, 5. 1 Salk. 323. S. C.

retain the money in court, to abide the event of the trial.

Upon an *erroneous* judgment, if there be a regular writ, the party may justify under it, till the judgment be reversed; for an erroneous judgment is the act of the court<sup>h</sup>: And the party need not set forth in his plea, that the writ has been returned. But if the judgment or execution be *irregular*, the party cannot justify under it, for that is a matter in the privity of himself or his attorney: And if the sheriff or officer, in such case, join in the same plea with the party, he forfeits the benefit of his defence<sup>i</sup>. The sheriff or officer however may justify under an *irregular* judgment, as well as an *erroneous* one; for they are not privy to the irregularity: And so as the writ be not void, it is a good justification, however irregular, and the purchaser will gain a title under the sheriff; for it would be very hard, if it should be at the peril of the purchaser, under a *fieri facias*, whether the proceedings were regular or not<sup>k</sup>. But a justification by the sheriff or officer, under a returnable process, is ill, without shewing a return of it; and if the plaintiff join with the officer, there must be judgment against both<sup>l</sup>. Where the plaintiff has execution, and the money is levied and paid, and the judgment is afterwards reversed, there the party shall have restitution

<sup>h</sup> 1 Str. 509.

<sup>k</sup> 1 Vez. 195.

<sup>i</sup> *Id. ibid.*

<sup>l</sup> 2 Str. 1184.



tution without a *scire facias*; because it appears on the record that the money is paid, and there is a certainty of what was lost; otherwise where it was levied, but not paid, for then there must be a *scire facias*, suggesting the matter of fact, *viz.* the sum levied, &c. But where judgment is set aside after execution for irregularity, there needs no *scire facias* for restitution; but if it be not made, an attachment shall be granted upon the rule, for a contempt <sup>m</sup>.

When the sheriff has taken goods upon a *feri facias*, to the amount of the sum directed to be levied, the defendant is discharged, and may plead it in bar to an action of *debt*, or *scire facias*, upon the judgment <sup>n</sup>: But where two persons are jointly and severally bound, and execution is had against one of them, and his goods are seized, but not sold, this cannot be pleaded in an action of *debt* against the other obligor; because it is no actual satisfaction <sup>o</sup>.



After a *feri facias*, if the plaintiff be not satisfied, he may have an *elegit* against the goods of the defendant, and a moiety of his lands <sup>p</sup>, or a *capias ad satisfaciendum*

<sup>m</sup> 2 Salk. 588.

<sup>o</sup> *Id. ibid.* 2 Show. 394.

<sup>n</sup> 2 Ld. Raym. 1072. 1 Salk. 822. S. C.

<sup>p</sup> Append. Chap. XLI. § 69.

*satisfaciendum* against his person; or he may sue out either of these writs in the first instance.

An *elegit* is founded on the statute *Westm. 2.* (13 *Edw. I.*) c. 18. by which it is enacted, “ that  
 “ when a debt is recovered or acknowledged in  
 “ the king’s court, or damages awarded, it shall be  
 “ in the *election* of him who sues for such debt or  
 “ damages, to have a writ to the sheriff, for levy-  
 “ ing the debt of the lands and chattels, or that the  
 “ sheriff deliver to him all the chattels of the debt-  
 “ or, (except his oxen, and beasts of the plough,)  
 “ and a moiety of his land, until the debt be le-  
 “ vied, by a reasonable price or extent; and if he  
 “ be evicted, he shall recover by writ of *novel dis-*  
 “ *seisin*, and afterwards by writ of *re-disseisin*, if  
 “ there be occasion.” The writ we are now speak-  
 ing of lies against the defendant in his life-time, or  
 his heir and tertenants after his death<sup>a</sup>: And it may  
 be had against peers of the realm, as well as others;  
 and also against executors and administrators,  
 upon a *devastavit* returned<sup>r</sup>. But it lies not against  
 an heir, till his full age; and therefore, on a *scire*  
*facias* brought against him, the *parol* shall demur,  
 because he may have a good plea to bar the exe-  
 cution, which might be mispleaded<sup>s</sup>. This writ  
 may be sued out after a year, without a *scire facias*,  
 upon awarding an *elegit* on the roll<sup>t</sup>, and continuing  
 it

<sup>a</sup> Append. Chap. XLI. §

<sup>s</sup> Gilb. *Exec.* 58.

70.

<sup>t</sup> Carth. 283. Append. Chap

<sup>r</sup> 1 *Crompt.* 346.

XLI. § 72..

it down by *vicecomes non misit breve*; and the plaintiff may have *elegits* awarded into as many different counties as he pleases, without being under the necessity of suing out *testatums*<sup>u</sup>. But it is said, that if he award an *elegit* into one county, and extend the lands upon that writ, and afterwards file it, he is barred, and cannot sue out an *elegit* into another county<sup>v</sup>.

Upon this writ, the sheriff is to impanel a jury; who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements<sup>w</sup>. The goods and chattels being appraised, are to be delivered to the plaintiff, at the price set upon them<sup>x</sup>; and in this respect, an *elegit* differs from a *fieri facias*, upon which the sheriff cannot deliver the goods, though he may sell them, to the plaintiff<sup>y</sup>. If the goods and chattels are sufficient to satisfy the plaintiff's demand, the sheriff ought not to extend the lands<sup>z</sup>, but otherwise he may extend them: And he may not only extend a moiety of the lands, properly so called, but also of a reversion<sup>a</sup>, or rent-charge issuing out of land<sup>b</sup>; and by the 29 *Car. II. c. 3.* lands, &c. held in *trust* may be extended,

<sup>u</sup> 1 Crompt. 346. 352. Law  
of Exec. 208. Append. Chap.  
XLI. § 73.

<sup>v</sup> 1 Crompt. 346. 352. Law  
of Exec. 287. but see Gilb.  
Exec. 53.

<sup>w</sup> Bac. Abr. tit. Exec. 349.

<sup>x</sup> Gilb. Exec. 33.

<sup>y</sup> 1 Ld. Raym. 346. Bac.  
Abr. tit. Exec. 352.

<sup>z</sup> 1 Crompt. 346. 2 Inst.  
395.

<sup>a</sup> Gilb. Exec. 38.

<sup>b</sup> Id. 39. Moor, 32.

tended, in the hands of trustees, for the debt of *cestui que trust*. But *copyhold* lands are not extendible <sup>c</sup>; nor a rent-seck <sup>d</sup>, advowson in gross <sup>e</sup>, or glebe belonging to a parsonage or vicarage <sup>f</sup>. A term for years may be either extended, or sold as part of the personalty <sup>g</sup>: If it be extended, the plaintiff is accountable for all the profits he receives out of the term, upon such extent; and if he receive the debt out of such term, before it expires, the defendant shall be restored to the term itself <sup>h</sup>, but otherwise he shall keep the term, and not account for the profits of it <sup>i</sup>.

No notice is given of executing an *elegit* <sup>j</sup>. And if there be no lands, the sheriff need not take or return an *inquisition* <sup>k</sup>; but otherwise an inquisition must be taken and returned, describing the lands with convenient certainty <sup>l</sup>; and after it is taken, the sheriff must deliver a moiety to the plaintiff, by metes and bounds <sup>m</sup>: If he do not, the return is ill, and may be quashed for uncertainty <sup>n</sup>; and if the defendant be joint-tenant, or tenant in common, it ought to be specially alleged in

<sup>c</sup> 1 Rol. Abr. 888. 3 Blac. Com. 419.

<sup>d</sup> Cro. Eliz. 656.

<sup>e</sup> Gilb. Exec. 39.

<sup>f</sup> *Id.* 40.

<sup>g</sup> 8 Co. 171.

<sup>h</sup> Gilb. Exec. 35.

<sup>i</sup> *Id.* 33.

<sup>j</sup> 1 Crompt. 363.

<sup>k</sup> 2 Str. 874.

<sup>l</sup> Moor, 8 Com. Dig. tit. Exec. (C. 14). Append. Chap. XLI. § 71.

<sup>m</sup> Dalt. Sher. 135.

<sup>n</sup> Carth. 453.

in the return <sup>o</sup>. But it has been adjudged, that upon an *elegit*, the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole <sup>p</sup>. If he deliver more than a moiety, the execution is void <sup>q</sup>.

It was formerly usual for the sheriff to deliver *actual* possession of a moiety of the lands: But he now only delivers *legal* possession, and in order to obtain actual possession, the plaintiff must proceed by *ejectment* <sup>r</sup>; in which he must not only prove the judgment, and by the judgment-roll, that an *elegit* issued and was returned, but he must also prove the writ of *elegit*, by a true copy thereof, and the inquisition thereon; for it is the *elegit*, and inquisition upon it, which carve out the term, and give the right of entry, the judgment-roll being no more than a *memorandum*, that the *elegit* issued and was returned <sup>s</sup>.

After an *elegit*, if lands be duly extended, and delivered to the plaintiff, he cannot afterwards have any other species of execution, unless in case of eviction; when he may proceed, in the method pointed out by the statute *Westm. 2.* or if he be evicted out of all the lands, he may sue out a *scire facias*

<sup>o</sup> Hut. 16.

<sup>p</sup> Doug. 472.

<sup>q</sup> 2 Salk. 563, 4. 1 Vent. 259.  
S. C.

<sup>r</sup> 2 Eq. Cas. Abr. 381. 3 T.

R. 295.

<sup>s</sup> Gilb. *Evid.* (by *Lofft*,)  
10, 11. Run. *Eject.* 330.



*facias* upon the statute 32 *Hen. VIII.* c. 5. to have a new writ of execution, for what remains unsatisfied: But if he be evicted out of part only, or of the whole but for a time, as by a prior judgment, so that the extent is still continuing, there is no remedy by this statute<sup>t</sup>. If the defendant has no lands, and the goods are not sufficient to satisfy the plaintiff, he may have a *capias ad satisfaciendum* after an *elegit*<sup>u</sup>: And a void *elegit* or inquisition, being as none, will not prevent the plaintiff from having a new *elegit* without a *scire facias*, though it be after the year<sup>v</sup>.

A question having arisen, in the court of Chancery, whether, upon an *elegit*, the plaintiff could be allowed *interest*, beyond the penalty of a judgment, lord *Hardwicke* was of opinion, that at law, upon a judgment entered up, the penalty is the *debitum recuperatum*, and the stated damages between the parties; but if the creditors do not take out an execution against the person of the debtor, or his personal estate, but extend the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds *quousque debitum satisfactum fuerit*, and at law the debtor cannot, upon a writ *ad computandum*, insist upon the creditor's doing more than account for

<sup>t</sup> Co. Lit. 289. b. Gilb. *Exec.* 1451. S. P.

57, 8.

<sup>v</sup> Gilb. *Exec.* 54.

<sup>u</sup> 1 Str. 226. 2 Ld. Raym.

for the extended value; but if the debtor come into a court of equity for relief, this court will give it him, by obliging the creditor to account for the whole that he has received; and as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal: And he said, he remembered very well, upon Serjeant *Whitaker's* insisting, before Lord Chancellor *Cowper*, that this would be repealing the statute of *Westminster*, his Lordship said, he would not repeal the statute, but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received <sup>w</sup>.



An *extendi facias* or *extent* <sup>\*</sup> lies in the following cases; first, for the debt of the crown; secondly, on a statute-merchant or statute-staple, or recognisance in nature of a statute-staple; and thirdly, on a judgment in an action of *debt* against an heir, on the obligation of his ancestor.

The king's debts are either of *record*, or not of record: in either case, the execution for them is a writ of *extent*, which is either an *immediate extent* <sup>y</sup>,  
or

<sup>w</sup> 3 Atk. 517, 18. and see execution at the suit of the Amb. 520, 1. 1 East, 403. crown. 1 East, 338. (a).

436. <sup>y</sup> Append. Chap. XLI. §

<sup>\*</sup> This is properly an exe- 75, &c.

or an extent *in aid* of the king's debtor<sup>z</sup>. As to debts of record, they bind the lands of the debtor, from the time of his becoming in debt to the king; and an execution may be taken out for such debts, though an *elegit* may have been issued at the suit of a subject<sup>a</sup>: And if the king's debt be prior on record, it binds the lands of the debtor, into whose hands soever they come; because it is in the nature of an original charge upon the land itself, and therefore must subject every one that claims under it: But if the lands were aliened in the whole or in part, as by granting a jointure, before the debt contracted, such alienee claims prior to the charge, and in that case the land is not subject<sup>b</sup>.

As to debts not of record, the remedy for the recovery of them is governed by the statute 33 *Hen. VIII. c. 39*<sup>c</sup>. by which it is enacted, that  
 “ all obligations and specialties, which shall be  
 “ made for any cause or causes touching or in any  
 “ wise concerning the king's most royal majesty,  
 “ or his heirs, or to his or their use, commodity  
 “ or behoof, shall be made to his highness, and  
 “ to his heirs, kings, in his or their name or names,  
 “ by these words, *to the lord the king*, and to none  
 “ other person or persons to his use, and to be  
 “ paid

<sup>z</sup> Append. Chap. XLI. § 79. tit. *Execution*, K.

<sup>a</sup> 2 Rol. Abr. 156, 7. Gilb. <sup>b</sup> *Id. ibid.*

Excheq. 88. 91. Bac. Abr. <sup>c</sup> § 50.

“ paid to his highness by these words, *to be paid*  
 “ *to the said lord the king, his heirs or executors,*  
 “ with other words used and accustomed in com-  
 “ mon obligations; and that all such obligations  
 “ and specialties shall be good and effectual in the  
 “ law, to all intents and purposes, and shall be of  
 “ the same nature, kind, quality, force and ef-  
 “ fect, to all intents and purposes, as the writings  
 “ obligatory taken and acknowledged according  
 “ to the statute of the staple at *Westminster*: And  
 “ that all suits, process, judgments, decrees and  
 “ executions, hereafter to be taken, pursued, or  
 “ given for the king, in any of the king’s courts  
 “ mentioned in that act, of or upon any of the  
 “ same obligations, shall be of the same or like  
 “ strength, force, effect and intent in the law to  
 “ all purposes, only against all and all manner  
 “ such person and persons as have been bound in  
 “ such obligations or specialties, as well spiritual  
 “ as temporal, and against their heirs, successors  
 “ executors and administrators, and every one of  
 “ them, and against none other, as writings obli-  
 “ gatory taken and acknowledged according to the  
 “ statute of the staple at *Westminster*, at any time  
 “ before the making of that act, had been used to  
 “ be taken, exercised and executed against any  
 “ lay person or persons<sup>d</sup>.”

“ And if any suit be commenced or taken, or  
 “ any

<sup>d</sup> § 53.

“ any process awarded for the king, for the reco-  
 “ very of any of his debts, then the same suit and  
 “ process shall be preferred before the suit of any  
 “ person or persons; and that the king, his heirs  
 “ and successors, shall have first execution against  
 “ any defendant or defendants, of and for his said  
 “ debts, before any other person or persons, so  
 “ *always that the king’s suit be taken and com-*  
 “ *menced, or process awarded for the said debt, at*  
 “ *the king’s suit, before judgment given for the*  
 “ *said other person or persons*<sup>e</sup>.”

This statute is not confined in its operation to bond debts only, but extends to all debts and executions, at the suit of the king<sup>f</sup>. And it is held to be restrictive upon the old prerogative, and introductive of a new law; for *ita quod, so always that the king’s suit*, &c. makes a condition precedent, and a limitation: Hence therefore, a judgment and execution executed by *elegit*, before any suit or process commenced by the king, shall be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject’s judgment, and assigned to the king before the subject’s execution<sup>g</sup>.

With respect to *personal* property, the general rule is, that where the king and a subject stand in equal degree, and the property of the debtor remains

<sup>e</sup> § 74.

<sup>f</sup> 7 Co. 18. b.

<sup>g</sup> Hard. 23. but see Dyer,

67. b.



remains unaltered, the king's prerogative must prevail<sup>h</sup>: *Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet*<sup>i</sup>: and therefore if an extent at the suit of the crown, be tested before or on the day of delivering the subject's execution to the sheriff, the former shall have the preference<sup>k</sup>. So an extent against the king's debtor, tested after a distress taken for rent, with notice to the tenant, and appraisement made, but before sale, shall prevail against the distress<sup>l</sup>. And as the crown is not bound by the acts relating to bankrupts, not being named in them, therefore an extent served upon the property of the bankrupt, will bind from the teste of the writ, and till actual assignment by the commissioners; but the king is bound by an actual assignment, because the property is then absolutely transferred to a third person<sup>m</sup>.

But as by the common law, abridged as it is by the statute of frauds, the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor, on which the prerogative of the crown can attach<sup>n</sup>: And therefore if goods be taken in execution, on a *fieri facias* against the king's debtor,

and

<sup>h</sup> 4 T. R. 411.

112. 2 Vez. 288. S. C.

<sup>i</sup> 9 Co. 129. b.

<sup>m</sup> W. Jon. 202. Bunb. 202.

<sup>k</sup> *Id. ibid.*

2 Show. Rep. 480.

<sup>l</sup> Bunb. 42, 3. 269. Parker,

<sup>n</sup> 4 T. R. 411.

and before they are sold, an extent issues at the king's suit, grounded on a bond debt, and tested after the delivery of the *feri facias* to the sheriff, these goods cannot be taken upon the extent<sup>o</sup>. But process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution to have priority, within the statute 33 *Hen. VIII. c. 39. § 74.* before the execution of a subject, issued on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's process; the king's writ of execution having been delivered to the sheriff, before the actual sale of the defendant's goods under the plaintiff's execution<sup>h</sup>.

*Immediate* extents take place among themselves, according to the teste<sup>a</sup>: And it is a rule, that an extent cannot be ante-dated, but must bear teste on the day it issues, though it be out of term; for it issues, out of the equity side of the Exchequer, which is always open<sup>r</sup>. An extent *in aid* is a writ issued at the instance of the king's debtor, for the recovery of his own debt<sup>s</sup>: but this being of an inferior

<sup>o</sup> 3 Mod. 236. Comb. 123.      <sup>p</sup> 1 East, 338.  
Parker, 262. Com. Dig. tit.      <sup>q</sup> Parker, 281. and see Gilb.  
*Debt*, G. 8. *Uppom v. Sum-* Excheq. 167, &c.  
*ner*, 2 Blac. Rep. 1251. 1296.      <sup>r</sup> 2 Str. 749. Gilb. Rep.  
4 T. R. 402. but see 2 Rol. 222. Bunb. 164. S. C.  
Rep. 295. Comb. 452. 2      <sup>s</sup> Append. Chap. XLI. §  
Show. 481. Bunb. 8. 1 Bur. 79.

ferior nature, is postponed to an *immediate* extent<sup>†</sup>.

On a statute-merchant, the first process after it was forfeited, and certified into chancery, was a writ of *capias si laicus*, directed to the sheriff, commanding him to take the body of the conusor, *if a layman*, to satisfy the debt<sup>‡</sup>. And if the sheriff returned upon this writ, that the party was dead, or not found in his bailiwick, a writ issued to extend the lands<sup>§</sup>, which might be made returnable in either bench; and the sheriff might thereupon deliver the lands, &c. to the conusee, upon a reasonable extent, without the delay or charge of a *liberate*<sup>¶</sup>. If the conusor was a *clerk*, the sheriff was directed to levy the debt of his moveable goods and chattels<sup>×</sup>.

On a statute-staple, or recognisance in nature of a statute-staple, if the conusor cannot be found within the staple, nor his goods to the value of the debt, the first process, after the certificate under seal in chancery, is a writ in nature of an extent, to take body, lands and goods, all in one writ; in which respect it is preferable to the statute-merchant, as being a much speedier remedy<sup>‡</sup>.

This

† Parker, 281, 2.

¶ F. N. B. 130. A. 1 Vent.

‡ F. N. B. 130. Append. 41.

Chap. XLI. § 81.

× F. N. B. 131. Append.

§ F. N. B. 130. A. Append. Chap. XLI. § 82.

Chap. XLI. § 83.

‡ 2 Bac. Abr. 334. Append. Chap. XLI. § 84.

This writ is returnable in chancery; and the same sort of proceedings are had under it, for extending the lands, &c. as upon an *elegit*<sup>a</sup>: But the sheriff after the extent, cannot deliver the lands, &c. to the conusee, but must seize them into the king's hands; and in order to get possession of them, the conusee must sue out a *liberate*, which is a writ issuing out of chancery, reciting the former writ and return, and commanding the sheriff to deliver to the conusee all the lands, tenements and chattels, by him taken into the king's hands, if the conusee will have them, by the extent and appraisement made thereof, until he shall be satisfied his debt<sup>a</sup>. Upon this writ, the sheriff cannot turn the tertenant out of possession, as upon an *habere facias possessionem*; but is only to deliver the legal possession, as upon an *elegit*, and in order to obtain the actual possession, the conusee must proceed by ejectment<sup>b</sup>.

By the common law, after a full and perfect execution had by extent, returned and entered of record, the conusee could have no re-extent on the effects of the conusor, (because there was once satisfaction given to the creditor on record,) though the lands had been recovered from him, before he had levied the debt out of them<sup>c</sup>. But by the statute

<sup>a</sup> *Ante*, 939.

<sup>b</sup> 1 Vent. 41. *Ante*, 941.

<sup>a</sup> F. N. B. 132. 1 Lutw. <sup>c</sup> Co. Lit. 290. a. Bac. Abr. 429. Append. Chap. XLI. § tit. *Execution*, (B. 6).  
85.

tute 32 *Hen. VIII. c. 5.* it is provided, that “if after any lands, tenements or hereditaments, be had and delivered in execution, upon a just and lawful title, wherewithal the said lands, &c. were liable, tied and bound, at such time as they were delivered and taken into execution, shall be recovered, divested, taken, or evicted out of or from the possession of any such person and persons as have and hold the same in execution, without any fraud, deceit, covin, collusion, or other default of the said tenant or tenants by execution, before such time as the said tenants by execution, their executors or assigns, shall have fully levied their whole debt and damages, for the which the said lands, &c. were delivered and taken in execution; then every such recoveror, obligee, and recognizee, shall have a *scire facias* out of the same court, from whence the former execution did proceed, against such person or persons as the former execution was pursued, their heirs, executors or assigns, to have execution of other lands, &c. liable to be taken in execution, for the residue of the debt or damages.”

This statute, by a favourable construction, was extended to the executors, administrators and assigns of the recoveror<sup>d</sup>, &c.; and to executions issuing out of any court, where the record is removed by writ of error, and affirmed<sup>e</sup>: But the statute, we have seen, did not extend to a partial eviction.

<sup>d</sup> Co. Lit. 290. a.

<sup>e</sup> *Id. ibid.*



eviction<sup>f</sup>. By a subsequent statute<sup>g</sup> however, which was made for supplying some defects in the statute 23 *Hen. VIII.* c. 6. it is enacted, that “in  
 “ case it shall, at any time or times, before or after  
 “ the filing or returning of any *liberate* or *liberates*,  
 “ sued out on any extent or extents, upon a re-  
 “ cognisance in the nature of a statute-staple,  
 “ be made appear to the court of Chancery, that  
 “ sufficient has not been extended and levied,  
 “ or sufficiently extended and levied, to sa-  
 “ tisfy such recognisance; or that any omission,  
 “ error or mistake has happened, in making, suing  
 “ out, executing or returning any of the said  
 “ writs, or any process thereupon; or it should  
 “ happen, that any lands, tenements or heredita-  
 “ ments shall be evicted from any person or per-  
 “ sons, who shall have extended the same, by  
 “ virtue of any such writ or process as aforesaid;  
 “ that then, and in every such case, the said court  
 “ of Chancery shall and may award one or more  
 “ re-extent or re-extents, for the satisfying the  
 “ same as aforesaid, and that writs of *liberate* or  
 “ *liberates* may be sued out thereupon.”

We have before seen, that in *debt* against an heir, on the obligation of his ancestor, the judgment for the plaintiff is *general*, for the debt and damages, or *special*, directing them to be levied of the lands descended<sup>h</sup>. On a general judgment, the execu-  
 tion

<sup>f</sup> *Ante*, 942.

<sup>g</sup> 8 Geo. I. c. 25. § 4.

<sup>h</sup> *Ante*, 854. and see

2 Wms. Saund. 7. (4.)

tion may be general also, against the defendant, his goods and chattels, or a moiety of his lands, by *capias ad satisfaciendum*, *fieri facias*, or *elegit*<sup>1</sup>: But where the judgment is special, the execution is so likewise, by a writ in nature of an extent, to levy the debt and damages, of all the lands descended<sup>k</sup>. And it seems that on a general judgment, although the plaintiff may have execution by *elegit* of a moiety of all the heir's lands, yet may he also at his election surmise, that the heir hath certain lands by descent, and pray to have execution of the whole of them<sup>l</sup>: For if the plaintiff had not this election, he might be a loser by the general writ of *elegit*, upon which he could have only a moiety in execution, inasmuch as the heir might not have any other lands except those descended<sup>m</sup>.



A *capias ad satisfaciendum* lay, at common law, in actions of trespass *vi et armis* only, but has since been given in other actions, by a variety of statutes<sup>n</sup>: And, where the defendant is at large, it commands the sheriff, or other officer to whom it is

<sup>1</sup> 2 Rol. Abr. 71. and see Vin. Abr. tit. *Heir*, (D). Bac.

Abr. tit. *Heir & Ancestor*, (H). 2 Wms. Saund. 7. (4.)

<sup>k</sup> *Id. ibid. Off. Brev.* 83, 4. Append. Chap. XLI. § 86.

<sup>l</sup> Append. Chap. XLI. § 87.

<sup>m</sup> 2 Rol. Abr. 72. Bac. Abr. tit. *Heir & Ancestor*, (H). 2 Wms. Saund. 7. (4.)

<sup>n</sup> Hob. 56.

is directed, to take the defendant, and him safely keep, so that he may have his body in court on the return-day, to satisfy the plaintiff°. Where the defendant is already in custody, there is no occasion for this writ; but if the plaintiff would proceed against his body, he must charge him in execution, as directed in a former chapter<sup>p</sup>.

This writ lies after judgment, in every instance where the defendant was subject to a *capias* before<sup>q</sup>; and it may be taken out against the defendant, sued by a wrong name, if he has omitted to take advantage of the misnomer<sup>r</sup>: but it lies not against Peers, or members of the House of Commons, except upon a statute-merchant or statute-staple<sup>s</sup>; nor against executors or administrators, unless a *devastavit* be returned<sup>t</sup>. An infant seems to be liable to this process<sup>u</sup>; and it may be taken out against bail, without any previous *feri facias*, or return of *nulla bona*<sup>v</sup>. In an action against husband and wife, they may both be taken in execution; and the wife shall not be discharged, unless it appear that there is fraud and collusion,

° Append. Chap. XLI. § 88, &c.

<sup>p</sup> Chap. XVI.

<sup>q</sup> 3 Co. 12.

<sup>r</sup> 2 Str. 1218.

<sup>s</sup> 1 Crompt. 345.

<sup>t</sup> 3 Blac. Com. 414.

<sup>u</sup> 2 Str. 1217. and see 1 Bos.

& Pul. 480.

<sup>v</sup> 2 Sm. 822. 1139.

collusion, between the plaintiff and her husband, to keep her in prison <sup>w</sup>.

In point of form, the *capias ad satisfaciendum* must pursue the judgment: therefore on a judgment against several defendants, it must include them all <sup>x</sup>. And if part of the demand has been already levied under a *fiery facias*, the *capias ad satisfaciendum* is only for the residue <sup>y</sup>. This writ must be signed, as well as sealed <sup>z</sup>; and it must be tested and returnable in term-time, in like manner as the *fiery facias* <sup>a</sup>. It was formerly necessary that there should be *fifteen* days at least between the teste and return of the *fiery facias* and *capias ad satisfaciendum*, by *original*: but as that occasioned great delay, it was enacted by the statute 13 Car. II. stat. 2. c. 2. § 6. that “in all actions of *debt*, and other *personal* actions, and also in all actions of *ejectment*, depending by original writ in the courts of King’s Bench and Common Pleas, after any judgment obtained therein, there need not be fifteen days between the teste and return of any writ of *fiery facias* or *capias ad satisfaciendum*; nor shall the want thereof be assigned for error.” This statute however does not extend to any writ of *capias ad satisfaciendum*, whereon a writ of *exigent* after

<sup>w</sup> 2 Str. 1167. 1237. 1 Wils.

<sup>y</sup> Append. Chap. XLI. §

149. Say. Rep. 149. *Ante*, 101, &c.

174.

<sup>z</sup> R. E. 1659.

<sup>x</sup> 6 T. R. 526, 7.

<sup>a</sup> *Ante*, 913, 14.

after judgment is to be awarded; nor to any *capias ad satisfaciendum* against the defendant, in order to make his bail liable. For the purpose of charging the bail, there ought to be eight days between the teste and return by *bill*<sup>b</sup>, and fifteen by *original*<sup>c</sup>; but a *capias ad satisfaciendum* returnable out of term, is not void as against the bail, though it may be set aside by the principal on motion, for irregularity<sup>d</sup>: and there may be an intervening term, between the teste and return of this writ<sup>e</sup>. If the *capias ad satisfaciendum* be informal, it may be amended, in like manner as the *fieri facias*<sup>f</sup>.

The common returns to a writ of *capias ad satisfaciendum* are, that the sheriff has taken the defendant, whose body he has ready<sup>g</sup>; or that the defendant is not found in his bailiwick<sup>h</sup>. On the latter return, the plaintiff may sue out an *alias capias*<sup>i</sup> into the same, or a *testatum*<sup>k</sup> into a different county; or he may have a *non omittas capias ad satisfaciendum* into either<sup>l</sup>: And as the defendant can only be once taken, it seems there may be several

<sup>b</sup> 2 Salk. 602.

<sup>c</sup> 13 Car. II. c. 2. § 6.

<sup>d</sup> 2 Bur. 1188.

<sup>e</sup> 2 Salk. 700. 2 Ld. Raym. 775. S. C.

<sup>f</sup> 2 Blac. Rep. 836. 2 T. R. 737. 5 T. R. 577. 6 T. R. 450.

<sup>g</sup> Append. Chap. XLI. § 92.

<sup>h</sup> *Id.* § 93.

<sup>i</sup> *Id.* § 95.

<sup>k</sup> *Id.* § 97, &c.

<sup>l</sup> *Id.* § 96.



veral writs running against him, at the same time, in different counties: Or, instead of suing out an *alias* or *testatum*, the plaintiff may, if the action was commenced by original writ, proceed at once to *outlaw* the defendant, by suing out an *exigi facias*<sup>m</sup>, and process of outlawry.

The defendant being taken upon a *capias ad satisfaciendum*, if he do not satisfy the plaintiff, either remains in custody of the sheriff, who may carry him immediately to the county-gaol<sup>n</sup>, or is removed by *habeas corpus* to the king's-bench prison. In either case, the execution is considered, *quoad* him, as a satisfaction of the debt<sup>o</sup>: Therefore a judgment creditor, who has taken his debtor in execution, cannot afterwards sue out a commission of bankrupt against him upon the same debt<sup>p</sup>. And if the plaintiff, having the defendant in execution, consent to his discharge, though it be on terms which are not afterwards complied with<sup>q</sup>, or upon giving a fresh security, which afterwards becomes ineffectual<sup>r</sup>, the plaintiff cannot resort to the judgment again, or charge the defendant's

<sup>m</sup> Append. Chap. XLI. § 106.

<sup>n</sup> 4 T. R. 555. *Ante*, 203.

<sup>o</sup> Hob. 59.

<sup>p</sup> 8 T. R. 123. But the court has no power to discharge the defendant out of execution, on the ground of

a commission of bankrupt having since been sued out against him by the plaintiff.

<sup>1</sup> Bos. & Pul. 302.

<sup>q</sup> 4 Bur. 2482. 6 T. R. 526, 7. 7 T. R. 420.

<sup>r</sup> 1 T. R. 556.

dant's person in execution; even though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on<sup>s</sup>. But a *capias ad satisfaciendum* is no actual satisfaction, so as to bar the plaintiff from taking out execution against other persons, liable to the same debt or damages<sup>t</sup>; though if the plaintiff consent to discharge one of several defendants, taken on a joint *capias ad satisfaciendum*, he cannot afterwards retake him, or take any of the other defendants<sup>u</sup>.

It was formerly holden, that if a person taken on a *capias ad satisfaciendum* died in execution, the plaintiff had no further remedy; because he had determined his choice, by this kind of execution, which, affecting a man's liberty, is esteemed the highest and most rigid in the law<sup>v</sup>. But now, by the statute 21 Jac. I. c. 24. reciting, that forasmuch as daily experience doth manifest, that divers persons of sufficiency in real and personal estate, minding to deceive others of their just debts, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison, than to make any satisfaction according to their

<sup>s</sup> 2 East, 243. Barnes, 205.

<sup>t</sup> Hob. 59.

<sup>u</sup> 6 T. R. 525.

<sup>v</sup> Hob. 52. 6 T. R. 526.

their abilities; to prevent which deceit, and for the avoiding of such doubts and questions, it is declared, explained and enacted, “ that the party or parties at whose suit, or to whom any person shall stand charged in execution, for any debt or damages recovered, his or their executors or administrators, may, after the death of the person so charged and dying in execution, lawfully sue forth and have new execution, against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he or they or any of them might have had, by the laws and statutes of this realm, if such person so deceased had never been taken or charged in execution.”

“ Provided, that this act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be and die in execution, to have or take any new execution, against any lands, tenements or hereditaments of such party so dying in execution, which shall at any time after the said judgment or judgments, be by him sold *bonâ fide*, for the payment of any of his creditors, and the money which shall be paid for the lands so sold, either paid or secured to be paid to any of his creditors, with their privity and consent,

“ in

“ in discharge of his or their due debts, or of some  
 “ part thereof.”

If a party taken on a *capias ad satisfaciendum* escape or be rescued, though the sheriff is hereby liable, because he ought to have taken the *posse comitatus*, yet the plaintiff may sue out a new execution; and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent <sup>w</sup>: And if the defendant escape from the king's-bench or fleet prison, the plaintiff, on application to a judge, may have an escape-warrant, in order to retake him, which shall be in force throughout *England* <sup>x</sup>.

By the common law, a prisoner in execution was to be kept *in salvâ et arctâ custodiâ*, till he satisfied the plaintiff. The rigor of imprisonment however is now considerably abated, by his being allowed, on giving security to the marshal, the benefit of the *rules* of the king's-bench prison, or of living within certain limits <sup>y</sup> out of its walls. This benefit may be had by one in custody on an *excommunicato capiendo* <sup>z</sup>; but it is never granted to a prisoner

<sup>w</sup> 2 Bac. Abr. 240. 244. R. 583. R. E. 35 Geo. III. 6  
 355. T. R. 305. R. T. 36 Geo. III.

<sup>x</sup> Stat. 1 Ann. c. 6.

6 T. R. 778.

<sup>y</sup> For the limits of the *rules* <sup>z</sup> 1 Str. 413. and for the  
 of the king's-bench prison, nature of this writ, see 7 T.  
 see R. E. 30 Geo. III. 3 T. R. 153.

soner in execution on a *criminal* account<sup>a</sup>, or for a contempt<sup>b</sup>.

A prisoner also, whether he be detained in custody on mesne process or in execution, may on petition to the court, have *day-rules* allowed him, or the liberty of going out of the prison or its rules, for transacting his business, in term-time. The petition for this purpose must be signed by the prisoner, before he goes at large<sup>c</sup>; and formerly, a day-rule might have been obtained in this court, every day during the term, as is still the practice in the Common Pleas: But this indulgence having been abused, a rule of court was made, that “no prisoner in the king’s-bench prison, or within the rules thereof, shall have, or be entitled to have, day-rules, above three days in each term; and every such prisoner, having a day-rule, shall return within the walls or rules of the said prison, at or before nine o’clock in the evening of the day for which such rule shall be granted<sup>d</sup>.” Still however it was open to a prisoner, on a special case, to obtain from the court more days than were allowed by the rule; as where his attendance was wanted by a master in chancery: but when that happened, they would restrain this indulgence to such days as the master should certify to be necessary.

<sup>a</sup> 1 Str. 196. 2 Str. 845.

<sup>d</sup> R. E. 30 Geo. III. 3 T.

<sup>b</sup> 2 Str. 817.

R. 584.

<sup>c</sup> 1 Str. 503.



cessary<sup>e</sup>. And now, by a late rule of court<sup>f</sup>, “notwithstanding the general rule before mentioned, “if any prisoner in the king’s-bench prison shall “state by affidavit any special cause, to the satisfaction of the court, for having an additional day-rule or day-rules, beyond those allowed by the “aforesaid rule, such additional rule or rules shall “be granted accordingly, for any day or days ensuing such application.”

Besides these indulgences, acts are occasionally passed, for the relief of insolvent debtors<sup>g</sup>: And towards the end of the last reign, some lasting provisions were made for their relief against imprisonment, by the statute 32 *Geo.* II. c. 28. § 13. which (originating in the House of Lords) is called the *Lords’* act. By this statute, “if any person “shall be charged in execution, for any sum of “money not exceeding 100*l.* (since extended to 200*l.* by the 26 *Geo.* III. c. 44. and to 300*l.* by the 33 *Geo.* III. c. 5. which is made perpetual by the 39 *Geo.* III. c. 50.) “and shall be minded to deliver up to his creditors, all his estate and effects, “in satisfaction of his debts, he may, in order to “entitle

<sup>e</sup> *Per* Lord Kenyon, E. 36 366. 399. 7 T. R. 305. 8  
Geo. III. T. R. 49. 1 Bos. & Pul.

<sup>f</sup> R. M. 37 Geo. III. 7 T. 477: on the insolvent act of  
R. 82. 37 Geo. III. c. 112. see 8

<sup>g</sup> For determinations on T. R. 424: and on the last  
the insolvent act of 34 Geo. III. insolvent act, of 41 Geo. III.  
c. 69. see 6 T. R. 28. 76. c. 70. see 2 East, 148. 257.

“ entitle himself to the benefit of the above acts,  
 “ before the end of the first term next after he shall  
 “ be charged in execution, exhibit a petition to any  
 “ court of law, from whence the process issued,  
 “ upon which he was taken and charged in execu-  
 “ tion; or to the court into which he shall be re-  
 “ moved by *habeas corpus*, or charged in custody;  
 “ certifying the cause of his imprisonment, and  
 “ setting forth a just and true account of all the  
 “ real and personal estate, which he, or any per-  
 “ sons in trust for him, was or were entitled to, at  
 “ the time of his so petitioning, and also at the time  
 “ of his first imprisonment, and of all incumbrances  
 “ and charges (if any) affecting the same, and like-  
 “ wise a just and true account of all securities,  
 “ deeds, evidences, writings, &c. concerning the  
 “ same, and the names and places of abode of the  
 “ witnesses.”

The humane provisions of the Lords' act were  
 rendered as beneficial as possible, by the liberality  
 of the judges, who construed it to extend to pri-  
 soners in custody upon an *attachmen<sup>t</sup>*, for the non-  
 performance of an award<sup>h</sup>, or non-payment of  
 costs<sup>i</sup>, &c; which construction has been recogni-  
 sed by the statute 33 *Geo. III. c. 5. § 4.* whereby,  
 after

<sup>h</sup> 1 T. R. 266.

T. R. 756. 1 Bos. & Pul.

<sup>i</sup> Cowp. 136. 1 T. R.

336.

265. 4 T. R. 317. 809. 7

after reciting that persons are often committed on attachments, for not paying money awarded, under submissions to arbitration by or made rules of court, and likewise for not paying costs, duly and regularly taxed and allowed, after proper demands made for that purpose, and also upon writs of *excommunicato capiendo*, or other process for or grounded on the non-payment of costs or expences, in causes or proceedings in ecclesiastical courts; it is declared and enacted, that “all such persons are and “shall be entitled to the benefit of this act, and “subject to the same terms and conditions as are “therein expressed and declared, with respect to “prisoners for debt only.” And it is no objection to a prisoner being discharged under the Lords’ act, that his creditor is dead<sup>k</sup>. But the defendant in a *qui tam* action is not entitled to the benefit of that act<sup>l</sup>. And a prisoner who is taken in execution for more than 300*l*. and afterwards reduces his debt below that sum, is not entitled to be discharged under the above act, in the next term after he has so reduced his debt, unless it be also the next term after he was taken in execution<sup>m</sup>.

The act requires, that the petition should be exhibited before the end of the *first* term next after the prisoner is charged in execution. But where a defendant taken on a *capias ad satisfaciendum* escaped,

<sup>k</sup> 1 Bos. & Pul. 336.

Rep. 372. S. C.

<sup>l</sup> 3 Bur. 1322. 1 Blac.

<sup>m</sup> 1 Bos. & Pul. 423.

caped, and was retaken and committed to the custody of the marshal in a subsequent term, the court held, that he might apply to be discharged, under the Lords' act, in the term following<sup>n</sup>. And by the statute 33 *Geo.* III. c. 5. § 5. "where any debtor  
 " shall have neglected to take the benefit of the  
 " acts, within the time limited, and shall make it  
 " appear to the court out of which the execution  
 " issued, that such neglect arose from ignorance  
 " or mistake, such debtor shall then be entitled to  
 " take the benefit of the acts, as if he had taken the  
 " same, within the time so limited as aforesaid." Upon which statute it has been holden, that a prisoner is entitled to the benefit of the acts, who has been prevented from applying for it in due time, by the misconduct of his agent<sup>o</sup>.

When a prisoner intends to take the benefit of the Lords' act, he must give to or leave for every creditor at whose suit he is in execution, or his executors or administrators, at his or their usual place of abode, or in case they cannot be met with, to or for his or their attorney or agent last employed in the action, a *notice* in writing<sup>p</sup>, signed with his proper name or mark, importing that he intends to petition the court, and setting forth a true copy of the account or schedule<sup>q</sup> he intends to deliver in; which  
 notice

<sup>n</sup> 4 T. R. 367.

107.

<sup>o</sup> *Id.* 231.

<sup>q</sup> *Id.* § 108.

<sup>p</sup> Append. Chap. XLI. §

notice must be given *fourteen* days at least before the petition is presented<sup>r</sup>: though the judges in one case held, in favour of liberty, that under circumstances, the day of giving the notice might be reckoned as one<sup>s</sup>. An affidavit is annexed to the notice and schedule, made by some person who saw the defendant sign them<sup>t</sup>: And an affidavit of the due service of the notice and schedule is also to be made, on unstamped paper, and sworn before a judge in town, or commissioner in the country<sup>u</sup>.

After the expiration of the time specified in the notice, the *petition*<sup>v</sup> is to be exhibited, with a certificate annexed, or copy of causes in which the defendant stands charged, obtained from the gaoler, or from the clerk of the papers, if the defendant be in custody of the marshal: If he be in any other custody, there must be an *affidavit*, of seeing the gaoler sign the certificate<sup>w</sup>. The petition, certificate and affidavit of service of the notice being left with the clerk of the rules, he will draw up a rule for bringing the prisoner into court, and summoning the creditors to appear, personally or by attorney, at some certain day to be therein specified<sup>x</sup>; a  
copy

<sup>r</sup> 32 Geo. II. c. 28. § 13.

<sup>u</sup> *Id.* § 110.

<sup>s</sup> 4 Bur. 2525.

<sup>v</sup> *Id.* § 111.

<sup>t</sup> Append. Chap. XLI. §

<sup>w</sup> *Id.* § 112.

<sup>x</sup> 32 Geo. II. c. 28. § 13.



copy of which rule should be served on each creditor, and also on the gaoler, and an *affidavit* made of such service<sup>y</sup>. But it is ordered, that insolvent debtors petitioning under the Lords' act, and subsequent acts for their further relief, shall be brought into court, during term-time, upon *Mondays* and *Thursdays*, and upon no other days<sup>z</sup>.

When the prisoner is charged in execution above twenty miles from *Westminster-hall*, or the court out of which the execution issued, the rule requires him to be brought to the next assizes, and that the creditors be summoned to appear there; and a copy of such rule is to be served on every creditor, his executors or administrators, or left at his or their dwelling house, or usual place of abode, or with his or their attorney, fourteen days at least before the holding of such assizes<sup>a</sup>.

On bringing up the prisoner, the court or judge of assize are, in a summary way, to examine into the matter of the petition; and after being sworn to the truth of his schedule, if no opposition be made, he is discharged of course, upon executing an assignment and conveyance of his estate and effects, for the benefit of his creditors; which is done by a short indorsement on the back of the petition<sup>b</sup>. The prisoner may be compelled, under the Lords' act,

<sup>y</sup> Append. Chap. XLI. § 113.

<sup>z</sup> R. H. 37 Geo. III.

<sup>a</sup> 32 Geo. II. c. 28. § 15.

<sup>b</sup> *Id.* § 13.

act, to include in his schedule, every thing that he can sell for his own benefit<sup>c</sup>: And the place of a life-guardsman being constantly sold, the court will compel a prisoner who holds such a place to sell it, and insert the value in his schedule, before they permit him to take the benefit of the act<sup>d</sup>. But the half-pay of an officer is not the subject of sale; and therefore a prisoner cannot be compelled to include it in his schedule<sup>e</sup>.

If the persons, at whose suit the prisoner is in execution, are not satisfied with the truth of his oath, and either personally or by attorney desire further time, the court may remand him; and direct the parties to appear on some other day, to be appointed by the court, within the first week of the next term at farthest<sup>f</sup>, or sooner if the court shall think fit<sup>g</sup>: And the creditors may file *interrogatories* for his examination, before he is admitted to take the benefit of the act<sup>h</sup>. In such case it is a rule, that the creditor do file his interrogatories with the clerk of the rules, and that the clerk of the rules do thereupon draw up a rule for the debtor's examination before the master, to whom he shall also deliver the original interrogatories; and that  
the

<sup>c</sup> 3 T. R. 681.

<sup>f</sup> 32 Geo. II. c. 28. § 13.

<sup>d</sup> *Id. ibid.* Cadwallader Jones's

<sup>g</sup> 3 Bur. 1393.

case, M. 14 Geo. III.

<sup>h</sup> 33 Geo. III. c. 5. § 5.

<sup>e</sup> 3 T. R. 681.

the debtor having been previously sworn in open court for the purpose, the master shall proceed to take down in writing the examination of the debtor, in answer to the said interrogatories; and the same being signed by the debtor, shall be afterwards filed by the master, with the clerk of the rules; and the said interrogatories and examination shall be produced by the clerk of the rules and read, when the debtor shall on a subsequent day be brought up by rule for that purpose <sup>i</sup>.

All objections to the insufficiency of the schedule, in point of *form*, must be made the first time the prisoner is brought up <sup>k</sup>. And if, at such second day, the creditor shall make default, or shall appear and be unable to discover any estate or effects omitted in the account, the court shall immediately order the prisoner to be discharged, upon his executing an assignment and conveyance of his estate and effects; unless the creditor insist upon his being detained in prison, and shall agree by writing, signed with his name or mark, (or, if he be out of *England*, under the hand of his attorney,) to pay and allow the prisoner weekly, a sum not exceeding 3*s.* 6*d.* or if more creditors than one insist on his detention, not exceeding 2*s.* a-week each<sup>l</sup>, to be paid on *Monday* in every week, so long

<sup>i</sup> R. E. 36 Geo. III.

<sup>l</sup> 37 Geo. III. c. 85. § 3, 4.

<sup>k</sup> 32 Geo. II. c. 28. § 15.

long as the prisoner shall continue in execution; and in every such case, the prisoner shall be remanded<sup>m</sup>. But if failure be made in payment of the said weekly sums, the prisoner, upon application to the court in term-time, or in vacation to a judge, may, by order of the court or judge, be discharged out of custody, on executing an assignment and conveyance of his estate and effects<sup>n</sup>.

The *note* or security for payment of the prisoner's allowance<sup>o</sup>, must be signed by the plaintiff, if in *England*, or otherwise by his attorney; it not being sufficient for the attorney to sign the note, if his client can be met with<sup>p</sup>: And if the note be not signed by the plaintiff in open court, it is the practice to require an affidavit with the note, shewing that it was duly signed<sup>q</sup>. Where there are several plaintiffs, the note must be signed by all of them<sup>r</sup>, or if they are partners, by one on behalf of himself and the others<sup>s</sup>; a note signed by one of several lessors of the plaintiff in *ejectment*<sup>t</sup>, or by one of several

<sup>m</sup> 32 Geo. II. c. 28. § 13. 114.

If a plaintiff hold the defendant in execution in several actions, he need not give more than one note for *ss. 6d.* a week. *Jones v. Cox*, M. 36 Geo. III.

<sup>n</sup> 32 Geo. II. c. 28. § 13.

<sup>o</sup> Append. Chap. XLI. §

<sup>p</sup> Imp. K. B. 646. and see 1 Bos. & Pul. 337.

<sup>q</sup> *Edwards v. Carter*, M. 36 Geo. III.

<sup>r</sup> 7 T. R. 156. 8 T. R. 325.

<sup>s</sup> 8 T. R. 25.

<sup>t</sup> 7 T. R. 156.

several executors<sup>u</sup>, without mentioning the others, not being deemed sufficient. The payment is to be made, by the act, every *Monday*; and the note must be drawn up accordingly<sup>v</sup>. It was determined in one case<sup>w</sup>, that such a note ought to be stamped: But the judges, upon a conference, afterwards held a stamp to be unnecessary<sup>x</sup>. If the payment be not made in time, the prisoner has a right to his discharge<sup>y</sup>: And where it was not made before ten o'clock at night of the day on which it became due, it was holden that the defendant's right to his discharge was not waived, by the turn-key on the felon's side accepting it after that time<sup>z</sup>. The mode of obtaining a prisoner's discharge for non-payment of the allowance, is by application to the court in term-time, or to a judge in vacation: And a judge's order for a prisoner's discharge under the Lord's act, made out of term, we have seen<sup>a</sup> is final.

It sometimes happens, that persons who are prisoners in execution in gaol for debt or damages, will

<sup>u</sup> 8 T. R. 325.

*Id. ibid.*

<sup>v</sup> *Blakemore v. Ronea*, M. 36 G. III. K. B. 3 Bos. & Pul. 184. C. P. And in this latter court, it seems that such a note ought to contain an express promise to pay the allowance on a *Monday*, although it be dated on that day of the week.

<sup>w</sup> 7 T. R. 530.

<sup>x</sup> *Id.* 670. 1 Bos. & Pul. 271.

<sup>y</sup> Say. Rep. 103. Doug. 67. and see 7 T. R. 157.

<sup>z</sup> 5 T. R. 36. and see 7 T. R. 156.

<sup>a</sup> *Ante*, 464.



will rather spend their substance in prison, than discover and deliver up the same, towards satisfying their creditors their just debts, or so much thereof as such substance will extend to pay: To remedy which, there are *compulsive* clauses in the Lord's act <sup>b</sup>, by which it is enacted, that "if any  
 "prisoner who shall be committed or charged in  
 "execution, in any prison or gaol, for any debt  
 "or damages not exceeding one hundred pounds,  
 "besides costs," (since extended to 200*l.* by the 26 *Geo.* III. c. 44. § 2.) "shall not within three  
 "months next after every such prisoner shall be  
 "committed or charged in execution, make satisfaction to his or her creditor or creditors, who  
 "shall charge any such prisoner in execution, for  
 "such debt, damages and costs; then such creditor or creditors may require every such prisoner (on giving twenty days *notice* <sup>c</sup> in writing to  
 "him or her, of such creditors design,) to give in  
 "to the court at law, from which the writ or process issued, on which any such prisoner shall be  
 "charged in execution, or into the court in the prison of which any such prisoner shall be removed by *habeas corpus*, or shall remain or be  
 "charged in execution, within the first seven days  
 "of the term which shall next ensue the expiration  
 "of the said twenty days, in respect to any prisoner  
 "ner

<sup>b</sup> 32 *Geo.* II. c. 28. § 16, 17.      <sup>c</sup> Append. Chap. XLI. § 115.

“ner charged in any prison belonging to the  
“courts in *Westminster-hall*; and at the second  
“court which shall be held by any other court of  
“record, after the expiration of the said twenty  
“days, in respect to any prisoner charged in any  
“prison belonging to such other court; and where  
“any such prisoner shall be charged in execution  
“in any county gaol, or other gaol or prison, above  
“the space of twenty miles distant from *Westmin-*  
“*ster-hall*, or the court or courts out of which the  
“writ or process issued, on which any such priso-  
“ner is or shall be charged in execution, then to  
“give in upon oath, at the assizes or great sessions,  
“and on the crown-side thereof, which shall be  
“held for the county or place in the prison of  
“which any such prisoner shall be, next after the  
“expiration of twenty days from the time of gi-  
“ving any such notice; a true account in writing,  
“to be signed with the proper name or mark of  
“every such prisoner, of all the real and personal  
“estate of such prisoner, and of all incumbrances  
“affecting the same, to the best of his or her  
“knowledge and belief, in order that the estate  
“and effects of such prisoner may be divested  
“out of him or her, and may by the court, judge  
“or judges, justice or justices aforesaid, be or-  
“dered to be assigned and conveyed in manner  
“and for the purposes thereafter declared<sup>d</sup>.”

“ And

<sup>d</sup> Append. Chap. XLI. § 117.

“ And every such creditor or creditors shall also  
 “ give twenty days’ like notice in writing, of such  
 “ his her or their intention to require any such  
 “ prisoner to be brought up as aforesaid, to all  
 “ and every other creditor and creditors of every  
 “ such prisoner, if any, at whose suit any such  
 “ prisoner shall be detained or charged in custody<sup>e</sup>,  
 “ if such other creditor or creditors can be met  
 “ with; and if not, then to the attornies last em-  
 “ ployed in the actions or suits, in which any such  
 “ prisoner shall be so detained or charged in custo-  
 “ dy, by any such other creditor or creditors: And  
 “ shall likewise give a like notice in writing to the  
 “ sheriff or sheriffs, gaoler or keeper of the gaol or  
 “ prison, in which any such prisoner shall be de-  
 “ tained in custody<sup>f</sup>, of such his or her intention  
 “ to have any such prisoner so brought up, and to  
 “ require such sheriff, &c. to bring up every such  
 “ prisoner accordingly; and every such notice which  
 “ shall be so given to any such sheriff, &c. shall be  
 “ so given, twenty days at least before the time  
 “ appointed for any such prisoner to be so brought  
 “ up; and thereupon every such sheriff, &c. shall  
 “ at the costs of such creditor or creditors, cause  
 “ every such prisoner to be brought, as by such  
 “ notice

<sup>e</sup> Append. Chap. XLI. § 116. intention to have the prisoner brought up, should require

<sup>f</sup> The notice to the sheriff him to bring up the prisoner or gaoler, of the plaintiff’s accordingly.

“ notice in writing shall be required, to such court,  
“ assizes or great sessions as aforesaid, together  
“ with a copy of causes of his or her detainer  
“ there.”

“ And that every prisoner who, in pursuance of  
“ this act, shall be brought up to any such court,  
“ assizes or great sessions as aforesaid, shall, on  
“ proof being there first made of such notices as  
“ aforesaid having been given, deliver in there in  
“ open court, upon oath, within the time therein-  
“ before for that purpose prescribed, a full true and  
“ just account, disclosure and discovery in writing,  
“ of the whole of his or her real and personal estate,  
“ and of all books, papers, writings and securities,  
“ relating thereto, and of all incumbrances then af-  
“ fecting the same, and the respective times when  
“ made, to the best of his or her knowledge and be-  
“ lief, (other than and except the necessary wearing  
“ apparel and bedding of such prisoner, and his or  
“ her family, and the necessary tools or instruments  
“ of his or her respective trade or calling, not ex-  
“ ceeding the value of ten pounds in the whole,)   
“ which account shall be subscribed with the pro-  
“ per name or mark of the prisoner, who shall so  
“ deliver in the same.”

“ And on the delivering in of any such account,  
“ the estate and effects of every such prisoner shall  
“ be by him or her assigned and conveyed, by a  
“ short

“ short indorsement on the back of every such account, to such person or persons as the court, judge or judges, justice or justices, in which or to whom any such account shall be so given in, shall order or direct, in trust, and for the benefit of the creditor or creditors, who shall have required any such prisoner to be brought up as aforesaid, and of such other creditor or creditors (if any) of every such prisoner, at whose suit any such prisoner shall be charged in custody or execution, and who shall, by any *memorandum* or writing, to be signed by such creditor or creditors, before any such conveyance or assignment shall be made, consent to any such prisoner’s being discharged out of gaol or prison, at his her or their suit, and agree to accept a proportionable dividend of such prisoner’s estate and effects, with the creditor or creditors who shall have required any such prisoner to be brought up; and if there shall be no other creditor or creditors, or there being any such, if he she or they shall not agree in writing to discharge such prisoner, and accept such proportionable dividend as aforesaid, then in trust for the creditor or creditors only, who shall require any such prisoner to be brought up for the purpose aforesaid: And by such assignment and conveyance as aforesaid, all the prisoner’s estate and effects shall be vested in the creditor or creditors, to whom the same  
“ shall



“ shall be assigned and conveyed in trust as afore-  
“ said; and if any *overplus* shall remain of any  
“ such prisoner’s estate, after payment of the debt,  
“ or damages and costs, which shall be due to any  
“ creditor or creditors, at whose suit any such  
“ prisoner shall, in pursuance of this act, be dis-  
“ charged out of gaol or prison, and all reasonable  
“ charges expended in or by means of getting in  
“ such estate or effects, the same shall be paid to  
“ such prisoner, his or her executors, administra-  
“ tors or assigns.”

“ And upon every such discovery, assignment  
“ and conveyance being made and executed, to  
“ the satisfaction of the court, judge or judges of  
“ assize, justice or justices of great session, before  
“ whom the same shall be made, every such prisoner  
“ shall, by such court, &c. be discharged and set  
“ at liberty, in the actions and charges, at the  
“ suit of the creditor or creditors, who shall re-  
“ quire him or her to be so brought up, and also  
“ in the actions and charges of every other credi-  
“ tor, who shall sign such consent as aforesaid, for  
“ his or her discharge, with the same benefit of  
“ making use of such discharge, as is therein be-  
“ fore provided for prisoners seeking, and who  
“ shall obtain their discharge, under the provisions  
“ contained in the former part of this act: And  
“ no stamp shall be necessary on any such assign-

“ment and conveyance, or any rule or order which shall be made for any such discharge.”

“But notwithstanding any discharge obtained by virtue of that act, for the person of any prisoner, the judgment obtained against every such prisoner shall continue and remain in force, and execution may at any time be taken out thereon, against the lands, tenements, rents, or hereditaments, goods or chattels of any such prisoner, other than and except the necessary wearing apparel and bedding for himself and family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l.* in value in the whole<sup>g</sup>, as if he had never been before arrested, taken in execution, and released out of prison<sup>h</sup>.” And it has been adjudged, that the effects acquired by an insolvent, after his discharge under the 34 *Geo.* III. c. 69. are liable to be taken in execution, for a debt due before<sup>i</sup>.

For executing a writ of *fieri facias* or *capias ad satisfaciendum*, the sheriff is entitled, by the statute 29 *Eliz.* c. 4. to twelve-pence for every 20*s.* when the sum exceedeth not a hundred pounds, and six-pence for every 20*s.* above that sum, that he shall levy or take the body in execution for; which is called .

<sup>g</sup> In the compulsive clause, § 17. the exception is general, and extends to all wearing apparel, &c. without any

restriction in point of value.

<sup>h</sup> 32 *Geo.* II. c. 28. § 20.

<sup>i</sup> 6 *T. R.* 366.

called his *poundage*\*. But by the statute 3 *Geo. I.* c. 15. § 17. poundage upon a *capias ad satisfaciendum* shall not be demanded or taken, for any greater sum than the real debt *bona fide* due, and marked on the back of the writ. And by the same statute<sup>k</sup>, the sheriff is entitled, upon executing a writ of *elegit*, to have for poundage twelve-pence for every 20s. of the yearly value of the lands, whereof possession is given, where the whole exceedeth not the yearly value of a hundred pounds, and six-pence only for every 20s. *per ann.* above that value.

By the statute 23 *Hen. VIII.* c. 6. § 8. there was due to his majesty, a fee of one half-penny in the pound, according to the value or sum entered into and contained in every recognisance in nature of a statute staple, taken in pursuance of the said statute, to be paid on sealing the first process on every such recognisance. But by the 8 *Geo. I.* c. 25. § 3. “the prosecutor of every such recognisance shall, at the time of suing out the first process, or a writ of extent thereon, deliver in to the officer who shall make out such process or extent, a note in writing under his hand, testifying the sum or value of the damages thereby intended to be extended, or levied thereon; which sum or value the said officer shall insert in the said writ, to be only extended or levied thereon, and no more; and

\* *Vide* p. 911.

<sup>k</sup> § 16.

and that the said poundage of one half-penny, payable on all process as aforesaid, shall be taken and paid only for every pound, according to the said sum or value so inserted, and intended to be extended and levied as aforesaid, and not otherwise: And that no sheriff of any county shall take for the extent and *liberate*, and *habere facias possessionem* or *seisinam* on the real estate, and levy on the personal estate, by virtue of such extent, any more than the same fees as are appointed by the 3 Geo. I. c. 15. for executing a writ of *elegit*, and *habere facias possessionem* or *seisinam*; under the like penalties and forfeitures, and to be in like manner recovered, against every sheriff or person therein offending, as are mentioned and appointed in and by the same act.”

If a sheriff levy under a *fieri facias*, he is entitled to poundage, though the parties compromise, before he sells any of the defendant's goods<sup>1</sup>; and he is entitled thereto, upon a *capias ad satisfaciendum*, though the defendant go to prison, without satisfying the plaintiff<sup>m</sup>. But it seems that he is not entitled to poundage on executing a writ of attachment, for non-payment of money<sup>n</sup>. For the poundage he is entitled to, the sheriff may maintain an action of *debt* on the statute<sup>o</sup>, or he may retain

<sup>1</sup> 5 T. R. 470.

<sup>n</sup> 2 East, 411.

<sup>m</sup> 4 Burr. 1981. *Imp. Sher.*  
145.

<sup>o</sup> 1 Salk. 209. 333. 2 Ld.  
Raym. 1212. S. C.

retain it out of the sum levied; and if the sheriff take more than he is entitled to, he is liable to an action for treble damages, at the suit of the party grieved <sup>p</sup>, and shall forfeit 40*l.* to the king and the informer <sup>q</sup>.

When the judgment is *satisfied*, by any of the above species of execution or otherwise, the defendant has a right to call on the plaintiff for a *warrant* <sup>r</sup> or authority, directed to some attorney of the court wherein the judgment is recovered, authorising such attorney to enter up satisfaction on the judgment-roll; which being obtained, a *satisfaction-piece* <sup>s</sup> is made out, on a slip of unstamped parchment, in the form of a bail-piece, and taken, with the warrant of attorney, to the clerk of the judgments, who will make an entry thereof in his book of remembrances, and deliver it over to the clerk of the treasury, who enters the same on the roll <sup>t</sup>.

<sup>p</sup> 2 T. R. 148.

118.

<sup>q</sup> 29 Eliz. c. 4.

<sup>s</sup> *Id.* § 119.

<sup>r</sup> Append. Chap. XLI. §

<sup>t</sup> *Id.* § 120.



## CHAPTER XLII.

## Of SCIRE FACIAS.

**A** *SCIRE FACIAS* is a *judicial writ*<sup>a</sup>, founded on some matter of record, as a recognisance, judgment, &c. on which it lies to obtain execution<sup>b</sup>, or for other purposes<sup>c</sup>, as to repeal letters-patent<sup>d</sup>, hear errors<sup>e</sup>, &c.

But though a *scire facias* be a judicial writ, yet because the defendant may plead thereto, it is considered in law as an *action*<sup>f</sup>: And therefore a release of all *actions* is a good bar to a *scire facias*<sup>g</sup>: And for the same reason, there must be a new

<sup>a</sup> Though a *scire facias* be properly a *judicial writ*, yet being the foundation of an action, it is sometimes considered as in nature of an *original*. Skin. 682. Comb. 455. S. C. and see 10 Mod. 258. In *Littleton*, § 505. it is called a writ of *execution*; and in one case, it was said to be in nature of a *declaration*. 1 Sid. 406.

<sup>b</sup> Lit. § 505. Co. Lit. 290. b. 291. a. F. N. B. 267. and see 3 Lev. 220.

<sup>c</sup> Bac. Abr. tit. *Scire facias*, A. B.

<sup>d</sup> *Id.* C. 3. And for a particular account of the writ of *scire facias* to repeal letters patent, when it lies, and in what court, the form of the writ, and the proceedings, trial and judgment thereon, see 2 Wms. Saund. 72. *p. q.* and see *id.* 6 (1). *ad finem.* 7 T. R. 367.

<sup>e</sup> *Post.* Chap. XLIII.

<sup>f</sup> Co. Lit. 290. b. 291. a. 2 Wils. 251. 2 Blac. Rep. 1227. 2 T. R. 46.

<sup>g</sup> Co. Lit. 290. b. Comb. 445. Skin. 682. S. C. 2 Ld. Raym. 1048. 2 Wils. 251.

new warrant, to authorise the appearance of the plaintiff's attorney<sup>h</sup>; and there is no occasion for a rule to change the attorney in the former suit<sup>i</sup>. So where a judgment was entered for securing the payment of an annuity, before the 17 *Geo. III. c. 26.* which requires, that "before any execution shall be sued out, or *action* brought on any such judgment, a memorial of the consideration, &c. shall be enrolled in chancery;" this court set aside a *scire facias*, &c. issued after the act, to revive the judgment, for want of such a memorial<sup>k</sup>.

Upon a recognisance, a *scire facias* is an original proceeding; but upon a judgment, it is only a continuation of the former suit; and therefore where the defendant's attorney, pending an action, agreed that no writ of error should be brought, and afterwards the defendant died, between the execution and return of the writ of inquiry, and thereupon a *scire facias* issued against his executors, to shew cause why the damages assessed upon the writ of inquiry, should not be recovered against them, upon which they brought a writ of error; the court held, that the executors were bound by the agreement of their testator's attorney, and accordingly

<sup>h</sup> Cro. Eliz. 177. 2 Ld. <sup>i</sup> Say. Rep. 218. and see Raym. 1048. 1252, 3. 1 Salk. 7 T. R. 337. 2 Bos. & Pul. 89. 2 Salk. 603. S. C. and see 357.

2 Bos. & Pul. 357. (b).

<sup>k</sup> 1 T. R. 267, 8.

cordingly ordered him to *nonpros* the writ of error<sup>l</sup>. For this is not a new action, but a continuation of the old one; it is only a *scire facias* to revive the former judgment; and as the testator himself, if he had lived, could not have brought a writ of error, so neither can his executors<sup>l</sup>.

A *recognisance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorised<sup>m</sup>, with condition to do some particular act: And it is either at common law, or by statute. A recognisance at *common law* is either to the king, or a subject; and may be acknowledged before any one of the judges out of term, and in any part of *England*, and may be entered on record, as well out of as in term: So the chancellor or keeper may take recognisances and award execution, or hold plea of *scire facias* and *audita querela* in chancery to avoid execution, &c. as the case requires, on all recognisances taken in that court<sup>n</sup>. By the custom of the city of *London*, the mayor and aldermen, or the mayor singly, may take recognisances; for the custom is not only reasonable in itself, but as all other customs of the city, has been confirmed by act of parliament<sup>o</sup>. And the king, by special commission, may appoint any person to take recognisances from one man to another; and such recognisances,  
duly

<sup>l</sup> 1 T. R. 388.

<sup>n</sup> Bac. Abr. tit. *Execution*,

<sup>m</sup> Bro. Abr. tit. *Recogni-* (B).

*sance*, 24.

<sup>o</sup> *Id. ibid.*

duly certified with the commission into Chancery, are binding: And though the commission be so particular, as to mention only a recognisance to be taken from *A.* to *B.* yet the commissioners have a general power to take a recognisance from any other person <sup>p</sup>.

But recognisances at common law are not perfect records, till they are *enrolled* in some court of record <sup>q</sup>; for since the law allowed any one judge out of court, and in any part of the kingdom, to take these recognisances, which are the highest security of the common law, it was very necessary they should be enrolled, to perpetuate the contract, and by that means secure the creditor his just debt, which must have been very precarious and uncertain, while the security lay in the hands of a private person, who might either through carelessness mislay, or by ill practices be prevailed upon to suppress it <sup>r</sup>.

Recognisances by *statute* are either founded on a statute-merchant or statute-staple; or are in nature of a statute-staple, by the 23 *Hen. VIII. c. 6.* A statute-*merchant* is a bond of record, acknowledged before the mayor of *London*, or chief-warden of some other city or town, or other discreet men for that purpose chosen and sworn, or before  
one

<sup>p</sup> Bac. Abr. tit. *Execution*,  
(B). F. N. B. 267.

<sup>r</sup> Bac. Abr. tit. *Execution*,  
(B). F. N. B. 267.

<sup>q</sup> But see 2 Vern. 750.

one of the clerks of the statute-merchant, pursuant to the statute of *Acton Burnel*, (11 *Edw. I.*) enforced and amended by the statute 13 *Edw. I.* stat. 3. *de mercatoribus*. This recognisance is to be entered by the clerk on a roll, which must be double, one part to remain with the mayor or chief-warden, and the other with the clerk, who shall write with his own hand a bill obligatory, to which a seal of the debtor shall be affixed, together with the seal of the king, for that purpose appointed<sup>s</sup>.

The statute-*staple* is a bond of record, acknowledged before the mayor of the staple, in the presence of the constables of the staple, or one of them, pursuant to the statute 27 *Edw. III.* stat. 2. c. 9. To this end, the statute requires that there shall be a seal ordained, which shall remain in the custody of the mayor of the staple, under the seals of the constables; and that all obligations made on such recognisances, shall be sealed therewith<sup>t</sup>. This security was only designed for the merchants of the staple, and for debts on the sale of merchandises

<sup>s</sup> Bac. Abr. tit. *Execution*, (B).

<sup>t</sup> *Id. ibid.* By the stat. 27 Eliz. c. 4. § 7, 8. the whole tenor and contents of all statutes-merchant and statutes-staple shall, within six months after they are acknowledged,

be entered in the office of the clerk of recognisances taken according to the 23 Hen. VIII. c. 6. who is to enter the same statutes in a book provided for that purpose; otherwise they are made void, as against subsequent purchasers.



chandises brought thither; yet in process of time, others began to apply it to their own purposes, and the mayor and constable would take recognisances from strangers, surmising that they were made for the payment of money, for merchandises brought to the staple: To prevent this mischief, the parliament in the 23 *Hen. VIII.* reduced the statute-staple to its former limits, and laid a penalty of 40*l.* on the mayor and constables, who should extend the benefit of the statute to any but those of the staple. But though the statute 23 *Hen. VIII. c. 6.* deprived them of this benefit, yet it framed a new sort of security, to be used by all persons, known by the name of a recognisance on the 23 *Hen. VIII.* or a recognisance in the nature of a statute-staple, so called, because this act limits and appoints the same process, execution, and advantage in every particular, as is provided for the statute-staple<sup>a</sup>.

A recognisance therefore in nature of a statute-staple, as the words of the act declare, is the same with the former, only acknowledged before other persons; for as the statute runs, the chief justices of the King's Bench and Common Pleas, and each of them, or in their absence out of term, the mayor of the staple at *Westminster* and the recorder of *London* jointly together, shall have power to take recognisances

<sup>a</sup> Bac. Abr. tit. *Execution*, (B).

recognisances for payment of debts, in the form set down in the statute<sup>v</sup>. In this, as in the former cases, the king appoints a seal to attest the contract, and each of the justices shall have the keeping of one such seal, and the mayor and recorder another of the like print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor and recorder, must be sealed with the seal of the conusor, the king's seal, and the seal of the chief-justice, or seals of the mayor and recorder before whom it is taken, who are likewise obliged to subscribe their names<sup>w</sup>. Besides this, a clerk was appointed to make, write and enrol all obligations thus acknowledged, and at the request of the conusee, his executors or administrators, to certify such obligations into chancery, under his seal<sup>x</sup>.

The statute-merchant having the seal of the conusor, besides the king's seal, the conusee may waive the execution given by the statute 13 *Edw. I.* and use it as an obligation, by bringing an action of *debt* thereon: So, for the same reason, may the conusee on the 23 *Hen. VIII. c. 6.* the recognisance having the seal of the conusor to it. But  
it

<sup>v</sup> Stat. 23 *Hen. VIII. c. 6.* cognisances, and certifying  
§ 2. them into chancery, see the

<sup>w</sup> *Id.* § 3. statutes 23 *Hen. VIII. c. 6.*

<sup>x</sup> *Id.* § 4, 5; and for the § 4, 5. 8 *Geo. I. c. 25.* § 1, 2.  
mode of enrolling these re-

it is otherwise of a statute-staple, because the king's seal only is affixed thereto, without that of the party, which is absolutely necessary in all obligations at common law <sup>y</sup>.

These several securities bind the land at common law, from the time they are entered into<sup>z</sup>: Therefore if a man be conusee of a statute, and the debtor, before execution sued, alien by fine, and five years pass, yet the conusee may still sue out execution<sup>a</sup>. But a creditor by statute of J. S. who becomes bankrupt before the statute is sued and executed, shall come in only *pro rata*, though there were lands bound by the statute<sup>b</sup>. And by the statute of frauds and perjuries<sup>c</sup>, “the day of the  
“ month and year of the enrolment of recogni-  
“ sances shall be set down in the margent of the  
“ roll, where the said recognisances are enrolled;  
“ and no recognisance shall bind any lands, tene-  
“ ments or hereditaments, in the hands of any pur-  
“ chaser *bonâ fide*, and for valuable consideration,  
“ but from the time of such enrolment.” It is also  
declared

<sup>y</sup> Bac. Abr. tit. *Execution*, (B); and for a fuller account of these securities, the differences between them, and the mode of proceeding thereon, see Bac. Abr. tit. *Execution*, (B). Com. Dig. tit. *Statute-Merchant*.

<sup>z</sup> 2 Bac. Abr. 363. 3 Co. 14.

<sup>a</sup> 1 Chan. Cas. 268. 1 Mod. 217.

<sup>b</sup> 1 P. Wms. 92.

<sup>c</sup> 29 Car. II. c. 3. § 18. extended to *Wales* and the counties *palatine*, by the 8 G. I. c. 25. § 6.

declared by the register-acts<sup>d</sup> that “no statute or  
 “recognisance (other than such as shall be entered  
 “into, in the name and upon the proper account  
 “of his majesty,) shall affect or bind any manors,  
 “lands, tenements or hereditaments, in *Middlesex*  
 “or *Yorkshire*, but only from the time that a me-  
 “morial of such statute or recognisance shall be  
 “entered at the register-office, in such manner as  
 “therein is directed.”

With regard to the *time* of suing out execution on these several securities, a distinction is to be made between recognisances at common law, and statutes-merchant, &c.; for upon the former, if the conusee did not take out execution, within a year after the day of payment assigned in the recognisance, he was obliged to commence the suit again by original; the law presuming the debt might have been paid, if he did not sue execution within a year after the money became payable: But this was altered by the statute *Westm. 2.* (13 *Edw. I.*) stat. 1. c. 45. which gives the conusee a *scire facias* to revive the judgment, and put it in execution, if the conusor cannot stay it, by pleading such matters as the law judges sufficient for that purpose, such as a release, &c. But the conusee of a statute-merchant, &c. may at any time  
 sue

<sup>d</sup> *Ante*, 862

sue execution, without the delay or charge of a *scire facias* <sup>e</sup>.

Another distinction is to be made between recognisances at common law, and by statute; for on the first, if the conusee die before execution sued, his executor shall not sue it, even within the year, without bringing a *scire facias* against the conusor: The reason is, because the law presumes that the debt might have been paid to the testator, and therefore will not suffer the debtor to be molested, unless it appear that he hath omitted to perform the judgment; and for that purpose a *scire facias* must be brought by the executor, for the alteration of the person altereth a process at common law: But this tending to delay, the *scire facias* was taken away on recognisances created by statute-law, by the several acts of parliament which introduced them; and therefore, upon the death of the conusee of a statute-merchant, &c. his executors may come into Chancery, and upon producing the testament and the statute, have execution without a *scire facias*, as the testator himself might have had <sup>f</sup>.

But the recognisance which will here principally claim our attention, is the recognisance entered into by the *bail* in an action, or upon a writ of error,

<sup>e</sup> Bac. Abr. tit. *Execution*,      <sup>f</sup> *Id. ibid.*  
B. tit. *Scire facias*, C.



error, either alone or jointly with the principal. The *form* of the recognisance of bail in an action differs, accordingly as the action is by *bill* or *original*: In actions by *bill*, the undertaking of the bail is general, that if the defendant be condemned in the action, they will pay the condemnation-money, if the defendant shall not pay the same, or render himself to the prison of the marshal<sup>g</sup>. By *original*, their recognisance is taken in a penalty or sum certain, being double the amount of the sum sworn to, upon the like condition<sup>g</sup>. Therefore, if the defendant be condemned in the action, and do not pay the condemnation-money, or render himself to the prison of the marshal, in due time, (or if there be several defendants, and they do not all render themselves<sup>h</sup>,) the recognisance is forfeited, and the bail are liable to be sued thereon, unless discharged by some of the means stated in a preceding chapter<sup>i</sup>: And a *cognovit* by the principal, without notice to the bail, does not discharge them<sup>k</sup>. But if the principal be not condemned, or (which is tantamount) be not condemned in the same action, as where the plaintiff declares against the defendant, for a different cause of action from what is expressed in the process<sup>l</sup>, or affidavit to

<sup>g</sup> *Ante*, 220.

<sup>k</sup> 5 T. R. 277. *Ante*, 244.

<sup>h</sup> 2 Lev. 192. 1 Vent. 315.

<sup>l</sup> 1 Str. 202. 2 H. Blac. 278.

<sup>i</sup> Chap. XI. p. 242, &c.

to hold to bail<sup>m</sup>, or by *original*, in a different county from that where the action is brought<sup>n</sup>, his bail are discharged: And they are also discharged, where the cause is referred to arbitration, unless it be agreed on the reference, that a verdict shall be taken, and judgment entered for the plaintiff's security<sup>o</sup>.

Before any proceedings can be had against the bail in the action, upon their recognisance, a *capias ad satisfaciendum* must be sued out against the principal, and returned *non est inventus*: For it is clearly settled, that no *scire facias* or action of *debt* lies against the bail in the action, until a *non est inventus* be returned, upon a *capias ad satisfaciendum* against the principal; for the bail are not bound to render the principal, till they know, by the plaintiff's suing out this writ, that he means to proceed against the person of the defendant<sup>p</sup>: And if the principal be already in custody of the sheriff, in another action, the sheriff will not be justified in returning *non est inventus*<sup>q</sup>. But so as the *capias ad satisfaciendum* be regularly sued out and returned, it may be *filed* at any time; the filing being  
mere

<sup>m</sup> 6 T. R. 363. 7 T. R. 80. 139. Cro. Car. 481. Sty. Rep.

<sup>n</sup> 3 Lev. 235. R. E. 2 Geo. 281. 288. 323. Lutw. 1273. 1

II. a. Barnes, 116. Ld. Raym. 156. 10 Mod. 267.

<sup>o</sup> *Ante*, 761, 2. R. E. 5 Geo. II. Reg. 3. a.

<sup>p</sup> Poph. 186. W. Jon. 29. <sup>q</sup> *Per. Cur. M.* 42 G. III.

inere matter of form<sup>r</sup>: And if the principal die after the return of the *capias ad satisfaciendum*, and before the return be filed, the bail are fixed, and the court will not stay the filing of the return, in favour of the bail<sup>s</sup>.

The *capias ad satisfaciendum* against the principal, should be directed to the sheriff of the county where the original action was laid: And where the proceedings are by *bill*, there must be eight days, or if by *original* fifteen days, between the teste and return of the writ<sup>t</sup>; the latter being a case excepted out of the statute 13 *Car. II.* stat. 2. c. 2. § 7: And in order to charge the bail, it must lie four days exclusive in the sheriff's office<sup>u</sup>; and be made returnable, like the former proceedings, on a day certain, or general return-day.

Upon the return of *non est inventus* to the *capias ad satisfaciendum*, the recognisance being forfeited, the plaintiff may proceed thereon against the bail in the action, and against the principal also, if he joined in the recognisance, by action of *debt* or *scire facias*: And the proceeding in either case may be commenced on the return-day of the *capias ad satisfaciendum* against the principal<sup>v</sup>. In *debt*, the plaintiff may bring one action against all the persons

<sup>r</sup> 1 Lev. 225. 3 Bur. 1360. Reg. 3. a.

1 Blac. Rep. 393. S. C.

<sup>u</sup> 2 Salk. 599. R. E. 5 Geo.

<sup>s</sup> 6 T. R. 284.

II. Reg. 3. a.

<sup>t</sup> 2 Salk. 602. 2 Ld. Raym.

<sup>v</sup> 8 T. R. 628. and see 2 Ld.

1177. S. C. R. E. 5 Geo. II. Raym. 1567. 2 Str. 866. S. C.

persons bound in the recognisance, or several actions against each of them: But one *scire facias* seems in all cases to be sufficient; for the recognisance being joint and several, it is holden that the execution may be several, though the *scire facias* was joint <sup>w</sup>.

In an action of *debt* upon a recognisance of bail, the defendant cannot be arrested; for the sufficiency of the bail must have been proved or admitted, previous to their being allowed; and if the defendant were arrested in such an action, there would be bail *in infinitum* <sup>x</sup>. And where a writ is sued out upon a recognisance of bail, it is necessary, by rule of court, that after the words "*in a plea of trespass,*" there should be inserted the following clause, "*and also to a bill of the said plaintiff, against the said defendant, in a plea of debt upon recognisance, according to the custom of our court before us to be exhibited;*" otherwise the defendant, or his attorney, is not bound to accept a declaration in *debt* upon such recognisance <sup>y</sup>.

We have already seen <sup>z</sup>, what time the bail are allowed to render their principal, when they are proceeded against in an action of *debt* upon their recognisance. We have also seen <sup>a</sup>, that on staying proceedings

<sup>w</sup> Bac. Abr. tit. *Execution*,      <sup>y</sup> R. E. 15 Geo. II. *Ante*,  
G. 1 Lev. 225. 1 Sid. 339. 84.

S. C.

<sup>z</sup> *Ante*, 237.

<sup>x</sup> *Ante*, 152, 3.

<sup>a</sup> *Ante*, 483.

proceedings, in an action of debt on recognisance, the bail must pay the costs in that, as well as the debt and costs in the original action, though they apply within the time allowed them for surrendering the principal: And on that account, it is in general more adviseable to proceed against the bail, by action of *debt* on the recognisance, than by *scire facias*, wherein no costs are allowed, unless they appear and plead, or join in demurrer<sup>b</sup>. There is also a further reason for proceeding by action of *debt* on the recognisance, namely, that in such an action, the plaintiff may recover damages for the detention of the debt, which he cannot do in *scire facias*<sup>c</sup>. But as a copy of the process must be served in *debt*, if the bail be out of the way, or the plaintiff do not mean to give them notice, he must proceed by *scire facias* on the recognisance.

A *scire facias* against the bail in the action, issues out of the court in which the action was depending; and begins by stating the recognisance, after which the judgment is set forth, *prout patet per recordum*: It then states, that the principal has not paid the debt or damages recovered, nor rendered himself to the prison of the marshal<sup>d</sup>; and concludes by requiring the sheriff to make known  
to

<sup>b</sup> Stat. 8 & 9 W. III. c. 11.

<sup>d</sup> 2 Salk. 439. 3 Salk. 320.

§ 3. 3 Bos. & Pul. 14.

2 Ld. Raym. 804. S. C.

<sup>c</sup> 3 Bur. 1791.



to the bail, that they be before the king at *Westminster*, on a day certain, (by *bill*, or by *original* on a general return-day, wheresoever, &c.) to shew if they have or know of any thing to say for themselves, why the plaintiff ought not to have his execution against them, for the debt or damages aforesaid, (by *bill*, or by *original* for the sum acknowledged,) according to the force, form and effect of the recognisance, if it shall seem expedient for him so to do; and further, &c.<sup>e</sup>. On a recognisance of bail, the *scire facias* against the principal is *in hac parte*, or that he do and receive what the court shall consider of him in *this* behalf; but against the bail it is in *eâ parte*, or that they do and receive what the court shall consider of them in *that* behalf<sup>f</sup>. And where a *scire facias*, was brought against three persons as bail, upon a recognisance acknowledged by them and the principal jointly, the writ abated; because this being founded on a record, the plaintiff ought to set forth the cause of the variance from the record, as that one was dead<sup>g</sup>: But if an action be brought upon a joint bond, against three only, where there are four or five obligors, there the defendant ought to shew that it was made by them and others in full life,

<sup>e</sup> Append. Chap. XLII. § 599. S. C. but see 1 Ld. 2, &c. Raym. 532. *semb. contra*.

<sup>f</sup> 1 Ld. Raym. 393. 2 Salk. <sup>g</sup> Aleyn, 21.

life, not named in the writ ; for otherwise the court will not intend that the bond was sealed <sup>b</sup>.

By the recognisance of bail in *error*, which will be more fully treated of in the next chapter, the plaintiff or plaintiffs in the writ of error become bound, with two sufficient sureties, in double the sum adjudged to be recovered by the former judgment, to prosecute the writ of error with effect, and also to satisfy and pay, if the judgment be affirmed, as well the debt or damages and costs adjudged upon the former judgment, as also all costs and damages to be awarded for the delay of execution <sup>i</sup>. Therefore if the writ of error be nonprossed or discontinued, or the judgment affirmed, the defendant in error may proceed against the bail upon their recognisance, by action of *debt* or *scire facias* at his election. And as a render in this case will not excuse the bail <sup>k</sup>, there is no occasion to sue out a *capias ad satisfaciendum*, in order to proceed against them.

The *scire facias* against bail in error should be brought in the same court where the recognisance was taken, unless it was taken in the Common Pleas, and then the *scire facias* may be brought either in that court, or in the King's-Bench, to which the record is supposed to be removed <sup>l</sup>.

This

<sup>b</sup> Aleyn, 21.

XLII. § 6, 7. 28, 29.

<sup>i</sup> Stat. 3 Jac. I. c. 8. 13 Car.

<sup>k</sup> R. M. 5 W: & M. (b).

II. stat. 2. c. 2. § 9. 16 & 17

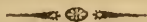
<sup>l</sup> Lil. Ent. 643. 3 Mod.

Car. II. c. 8. § 3. 19 Geo. III.

251. 1 Wils. 98.

c. 70. and see Append. Chap.

This writ is made out by the clerk of the errors<sup>m</sup>; and on a recognisance taken in the King's-Bench, it recites not only the recognisance, but the condition of it, and the affirmance of the judgment<sup>n</sup>, &c. but on a recognisance taken in the Common Pleas, the *scire facias* merely states the recognisance, and the non-payment of the sum acknowledged to be due<sup>o</sup>; for in that court, the condition of the recognisance in error is not incorporated, as it is in a recognisance of bail on a *capias ad respondendum*, but it is subscribed by way of defeasance; so that the recognisance and condition are two distinct records<sup>p</sup>: And besides, if the condition were stated, it would be necessary to state also the affirmance of the judgment, which might occasion difficulty, if the bail were to appear and plead *nul tiel record* of the judgment of affirmance, which remains in the King's-Bench.



A *scire facias* upon a *judgment* is either by or against the *same* or *different* parties. As between the *same* parties, it will be proper to treat of a *scire facias*, in the following cases; first, after a *year* and a day; secondly, after a writ of *error* brought in the King's-Bench, to compel the plaintiff in error to assign errors; thirdly, where judgment

<sup>m</sup> Barnes, 93.

<sup>o</sup> *Id.* § 5.

<sup>n</sup> Append. Chap. XLII. § 6.

<sup>p</sup> Barnes, 93. 339.

ment is given in *covenant* or *annuity*, or in *debt* on bond conditioned for the payment of an *annuity*, or of money by *instalments*, or for the performance of *covenants*, and damages arise, or money becomes payable, on the same security, after the judgment; and fourthly, when the debt or damages recovered are to be levied out of *future* effects, or, in the case of an executor or administrator, *de bonis propriis*. And first, of the *scire facias* after a year and a day.

At common law, in *real* actions, where land was recovered, the demandant after the year, might have taken out a *scire facias* to revive the judgment, because the judgment being particular *quoad* the land, with a certain description, the law required that the execution of that judgment should be entered upon the roll, that it might be seen, whether execution was delivered of the same thing of which judgment was given; and therefore if there was no execution appearing on the roll, a *scire facias* issued, to shew cause why execution should not be awarded <sup>a</sup>: Besides, in real actions, if execution was not sued within the year, a *scire facias* lay for the land, because no other advantage could be taken of the judgment, as an action of *debt* could not be maintained thereon <sup>r</sup>.

But if the plaintiff, after he had obtained judgment in a *personal* action, had lain by, and taken no process of execution within the year, he was put to a  
new

<sup>a</sup> Bac. Abr. tit. *Execution*, H.      <sup>r</sup> 3 Salk. 321.

new original upon his judgment, and no *scire facias* was issuable ; because there was not a judgment for any particular thing in the personal action, with which the execution could be compared : Therefore after a reasonable time, which was a year and a day, it was presumed to be executed, and the law allowed him no *scire facias*, to shew cause why there should not be execution ; but if the party had exceeded his time, he was put to his action on the judgment, and the defendant was obliged to shew how the debt, of which the judgment was evidence, was discharged <sup>s</sup>.

To remedy this, and make the modes of proceeding more uniform in both actions, the statute of Westm. 2. (13 *Edw.* I.) stat. 1. c. 45. gave a *scire facias* to the plaintiff in a personal action to revive the judgment, where he had omitted to sue execution within the year after judgment was obtained <sup>t</sup>. The words of the act are “ that those  
 “ things which are found enrolled before them that  
 “ have the record, or contained in fines, whether  
 “ they be contracts, covenants, obligations, ser-  
 “ vices or customs, recognisances, or other things  
 “ whatsoever enrolled, to which the King’s court  
 “ may lawfully give effect, from henceforth shall  
 “ have such force, that hereafter it shall not be  
 “ necessary

<sup>s</sup> Bac. Abr. tit. *Execution*, S. C.

H. but see 2 Salk. 600. 7      <sup>t</sup> Bac. Abr. tit. *Execution*,  
 Mod. 64. 2 Ld. Raym. 806. II.



“ necessary to implead upon them: But when the  
“ plaintiff comes to the king’s court, if the recog-  
“ nissance or fine levied be recent, that is to say,  
“ levied within the year, he shall forthwith have  
“ a writ of execution of the same recognisance.  
“ And if perchance the recognisance were made,  
“ or fine levied, of a longer time past, the sheriff  
“ shall be commanded, that he make known to the  
“ party of whom the complaint is made, that he  
“ be before the justices at a certain day, to shew if  
“ he has any thing to say, why such matters en-  
“ rolled, or contained in the fine, ought not to have  
“ execution: And if he do not come at the day, or  
“ come and can say nothing why execution ought  
“ not to be made, the sheriff shall be commanded  
“ to cause the thing enrolled, or contained in the  
“ fine, to be executed.” But notwithstanding this  
statute, the plaintiff may still proceed, if he think  
proper, by action of *debt* on the judgment.

It hath been doubted, whether a *scire facias* lay  
to revive a judgment in *ejectment*, after a year and  
a day, either by the common law, or by force of the  
above statute; for at common law, this was look-  
ed upon as a personal action, and it was thought  
that the statute extended only to such personal ac-  
tions, in which debt or damages were recovered,  
and not to provide a remedy in this case, since at  
the time of making the act, the possession was not  
recovered

recovered in this action: But it seems now to be settled, and is confirmed by daily practice, that a *scire facias* lies on a judgment in *ejectment*; for the words of the act are, “whether they be contracts, &c. or other things whatsoever enrolled,” which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a real action at common law<sup>u</sup>.

The reason why the plaintiff is put to his *scire facias* after the year, is because where he lies by so long after judgment, it shall be presumed that he hath released the execution, and therefore the defendant shall not be disturbed, without being called upon, and having an opportunity in court of pleading the release, or shewing cause, if he can, why the execution should not go<sup>v</sup>. And it is said, that if the plaintiff delay executing a writ of inquiry, till a year after interlocutory judgment, he cannot do it after, without a *scire facias*<sup>w</sup>. The year must be computed from the day of signing judgment<sup>x</sup>; and is to be reckoned by calendar months, and not by terms<sup>y</sup>. And if the plaintiff sue a *scire facias* within a year after the judgment, he

<sup>u</sup> Bac. Abr. tit. *Execution*, H. The *scire facias* in this case should go against the tert-nants, as well as the defendant.

1 Salk. 258. and see Carth. 2.

2 Salk. 600. 1 Ld. Raym. 669.

3 Salk. 319. S. C. Run. Eject. 14.

426, &c.

<sup>v</sup> 2 Inst. 470.

<sup>w</sup> 12 Mod. 500. *sed quare*, whether a term's notice is not in this case sufficient?

<sup>x</sup> Barnes, 197.

<sup>y</sup> 1 Str. 301. and see 6 Mod.

he cannot afterwards have a *capias* within the year, till he hath a new judgment in the *scire facias* <sup>z</sup>.

But in the case of the *king*, there need not be any *scire facias* after the year <sup>a</sup>, for *nullum tempus occurrit regi*. And though the general rule be, that the plaintiff cannot in other cases take out execution after the year, without a *scire facias*, yet this rule must be understood with the following restrictions.

Where a *feri facias* or *capias ad satisfaciendum* is taken out within the year, and not executed, a new writ of execution may be sued out at any time afterwards, without a *scire facias*; provided the first writ be returned, and continuances entered from the time of issuing it <sup>b</sup>: which continuances may be entered after the issuing of the second writ, unless a rule be made upon motion, for the proceedings to remain *in statu quo*. And if judgment be given, and no execution sued out within the year, yet the plaintiff may afterwards enter an award of an *elegit* on the roll of the judgment, as of the same term with the judgment, and thence continue it down by *vicecomes non misit breve*: And though the court at first inclined to think, that an *elegit* ought to be actually taken out within the year, yet being informed by the clerks of the court,

<sup>z</sup> Rol. Abr. 900.

1 Keb. 159. S. C. Carth. 283.

<sup>a</sup> 2 Salk. 603.

Comb. 232. S. C. 3 Salk. 321.

<sup>b</sup> Co. Lit. 290. b. 2 Inst. 1 Str. 100,

471. 2 Leon. 77, 8. 1 Sid. 59.

court, that it had been the practice for many years to make such an entry, &c. it was said to be the law of the court, and they ordered the execution to stand <sup>c</sup>.

If the plaintiff have judgment with a *cesset executio*, or stay of execution for a year, he may after the year, take out execution without a *scire facias* <sup>d</sup>; because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff ought not to be turned to his prejudice: But if the plaintiff do not take out execution, within a year after the *cesset executio* is determined, he must sue out a *scire facias* <sup>e</sup>.

So if the defendant bring a writ of *error*, and thereby hinder the plaintiff from taking out execution within the year, and the judgment be affirmed, the plaintiff in error nonsuited, or the writ of error abated or discontinued, the defendant in error may proceed to execution after the year, without a *scire facias* <sup>f</sup>; because the writ of error was a *supersedeas* to the execution, and the defendant in error must wait till it be determined. It has even been holden, in one case <sup>g</sup>, that if a writ of error be brought after the  
year

<sup>c</sup> Carth. 283. Comb. 232. Eliz. 416. Carth. 237. 6 Mod. S. C. 288. 1 Salk. 322. S. C. 3 Salk.

<sup>d</sup> 6 Mod. 288. 1 Salk. 322. 321.

S. C. § 1 Rol. Rep. 104. Cro. Jac.

<sup>e</sup> 2 Crompt. 102. 364. S. C.

<sup>f</sup> 2 Inst. 471. 5 Co. 88. Cro.

year is elapsed, and thereupon the former judgment is affirmed, such affirmance will revive the former judgment, and enable the party to take out execution, without a *scire facias*: But from this case it seems, that if the plaintiff in error be nonsuited, or the writ of error discontinued, there can be no execution of the former judgment, without a *scire facias*.

It was formerly holden, that if the plaintiff were restrained by *injunction* out of Chancery for a year, he could not take out execution afterwards, without a *scire facias*<sup>h</sup>; because the courts of law do not take notice of Chancery injunctions, as they do of writs of error: besides, it might be no breach of the injunction, to take out execution within the year, and continue it down by *vicecomes non misit breve*, which cannot be done in the case of a writ of error. But in a modern case<sup>i</sup>, where it appeared that the whole delay had arisen on the part of the defendant, by bills in chancery for injunctions, and by obtaining time for payment, &c. the court were unanimous, that this rule, of reviving a judgment above a year old by *scire facias*, before execution, which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by one, who was so far from being surprised

<sup>h</sup> 6 Mod. 288. 1 Salk. 322.      <sup>i</sup> 2 Bur. 660.  
S. C. 1 Str. 301. S. P.



surprised by the delay, that he himself had been trying all manner of methods, whereby he might delay the plaintiff; and therefore they discharged the rule for setting aside the execution, with costs.

The *scire facias* upon a judgment must be sued out of the same court where the judgment was given, if the record remains there<sup>k</sup>; or if it has been removed, out of the court where the record is. If the judgment be under *seven* years old, the plaintiff, we have seen<sup>l</sup>, may sue out a *scire facias*, as a matter of course, without any rule or motion: If it be above *seven* years, but under *ten*, he cannot have a *scire facias*, without a side-bar rule<sup>m</sup>. If it be above *ten* years old, but under *twenty*, there must be a motion under counsel's hand, supported by an affidavit that the judgment is unsatisfied<sup>n</sup>: And if the judgment be of more than *twenty* years standing, there must be a rule to shew cause, on a similar affidavit<sup>o</sup>.

A *scire facias* upon a judgment, after a year and a day, states the judgment recovered by the plaintiff, which differs according to the nature of the action, and the court in which it was obtained: And when a *scire facias* is brought on a judgment  
in

<sup>k</sup> Comb. Dig. tit. *Pleader*, 3 Sty. P. R. 495.

L. S.

<sup>n</sup> *Id. ibid.*

<sup>l</sup> *Ante*, 439. (o).

<sup>o</sup> *Blakeley v. Vincent*, T. 35

<sup>m</sup> 2 Salk. 598. Comb. 356. Geo. III. *Waters v. Hales*, E.

S. C. and see Cl. Inst. 159. 37 Geo. III.

in the King's Bench, the plaintiff must shew where the court of King's Bench was held, because that court is ambulatory: But if it be brought upon a judgment in the Common Pleas, it is otherwise, because that court is confined to a certain place<sup>p</sup>. It then states, that although judgment be thereupon given, yet execution of the debt or damages still remains to be made; and commands the sheriff, to make known to the defendant, that he be in court at the return-day, to shew why the plaintiff ought not to have execution against him for the debt or damages, according to the form and effect of the recovery, &c<sup>q</sup>. This being a judicial writ, must pursue the nature of the judgment: therefore if a joint judgment be obtained against two, the *scire facias* must be against both<sup>r</sup>: And in setting out the judgment, if there be a material variance, it will be fatal, on *nul tiel record*.

Where a *scire facias* is brought in the King's Bench, upon a judgment of an *inferior* court, it must appear in the writ itself, how the judgment came into the King's-Bench, whether by *certiorari*, or by writ of error, because the execution is different<sup>s</sup>; for if it came in by *certiorari*, the *scire facias* ought to shew the particular limits of the inferior jurisdiction, and pray execution within those

<sup>p</sup> 3 Salk. 321.

S. C.

<sup>q</sup> Append. Chap. XLII. § 31, &c.

<sup>s</sup> 3 Salk. 320. 1 Ld. Raym. 216. S. C.

<sup>r</sup> 2 Salk. 598. Carth. 105.

those limits <sup>t</sup>: But if the judgment be removed into the King's-Bench by writ of error, and affirmed, the party may have execution in any part of *England*; for by the affirmance, it is become the judgment of the King's-Bench <sup>u</sup>.

After the judgment has been once revived by *scire facias*, if the plaintiff do not take out execution within a year <sup>v</sup>, or the defendant die before execution <sup>w</sup>, the plaintiff cannot afterwards take it out, without a new *scire facias*, or action on the judgment; but he may have a new writ without motion, for the judgment was revived before <sup>x</sup>.

*Secondly*: As the parties in the King's-Bench, have no day in court given to either of them, on the removal of the record by writ of *error*, the defendant in error hath no other way of compelling the plaintiff to assign his errors, than by suing out a writ of *scire facias quare executionem non*, &c. <sup>y</sup>; and if upon such writ, the plaintiff in error do not assign errors, but suffer judgment to pass by default upon *scire feci*, or two *nihils*, no errors afterwards

<sup>t</sup> But see the statutes 19 Geo. III. c. 70. and 33 Geo. III. c. 68. by which execution may be issued in certain cases, out of the courts at *Westminster*, upon judgments obtained in inferior courts, against the person or effects of the defendant, in like manner as upon judgments obtained in the courts above: And see 1 H.

Blac. 532. *Ante*, Chap. XVII.

<sup>u</sup> Append. Chap. XLII. § 43, &c. 1 *Ld. Raym.* 216. 3 *Salk.* 320. *S. C.* and see 3 *T. R.* 657.

<sup>v</sup> 2 *Crompt.* 103. *Imp. K. B.* 382.

<sup>w</sup> 2 *Salk.* 598.

<sup>x</sup> *Id. ibid.*

<sup>y</sup> *Godb.* 68. 3 *Leon.* 107.

wards assigned shall prevent execution<sup>z</sup>. This writ, and the proceedings thereon, will be more fully treated of in the next chapter.

*Thirdly*, with respect to demands arising after the judgment, it is said to have been adjudged, that in covenants perpetual, as to repair, &c. if they be once broken, and an action of *covenant* brought, and a recovery had thereon, if they be afterwards broken, the plaintiff shall have a *scire facias* upon the judgment, and need not bring a new writ of covenant<sup>a</sup>.

Upon a writ of *annuity*, the old books differ as to the necessity of a *scire facias*, in order to have execution for subsequent arrears. In some books it is said, that if judgment be given in a writ of *annuity*, the plaintiff shall have execution, within the year after every day of payment, by *feri facias* or *elegit*, though it be many years after the judgment<sup>b</sup>; but other books seem to hold a different doctrine, and that for arrearages incurred after the judgment, it is necessary to have a *scire facias*, in order that the defendant may have an opportunity of pleading payment, or other matter in bar of execution<sup>c</sup>.

<sup>z</sup> Carth. 40, 41.

<sup>a</sup> Cro. Eliz. 3. but see 3 Leon. 51.

<sup>b</sup> 21 Edw. III. 22. 2 Inst. 471. 1 Rol. Abr. 900. 2 Blac. Rep. 844.

<sup>c</sup> 11 Hen. IV. 34. Bro. Abr. tit. *Annuity*, pl. 17. tit. *Scire facias*, pl. 75. Co. Lit. 145. 2 Co. 37. 6 Co. 45. Jenk. 51, 2. 1 Rol. Abr. 229. 1 Salk. 258. 2 Salk. 600.



ecution. And this latter opinion is in some measure confirmed by the language of the judgment, which is to recover the annuity, and arrearages of the same, as well before the bringing of the action as afterwards, up to the time when judgment is given<sup>d</sup>; but the amount of the arrearages subsequent to the judgment not being ascertained, it seems to be necessary to have a *scire facias*, to warrant an execution.

In an action of *debt* on bond, conditioned for the payment of an *annuity*, after judgment had been once obtained, it does not seem to have been formerly necessary to have a *scire facias*, to warrant an execution for subsequent arrears; but an execution might have been sued out for such arrears, without a *scire facias*, at any time within a year after they were incurred, or even afterwards, if a writ of execution had been previously taken out, and was properly continued down<sup>e</sup>. Under such an execution however, the plaintiff was not allowed to levy the whole penalty, but only the arrears; and therefore where he levied the whole penalty, the court made a rule upon him to refund the overplus, beyond what would satisfy the arrears; and that judgment should stand as a security, with liberty to take out execution, as future arrears should

<sup>d</sup> Co. Ent. 50. Cro. Car.  
436. *Ante*, 842.

<sup>e</sup> 2 Blac. Rep. 843. and see  
1 H. Blac. 297.



should arise<sup>f</sup>. And now, as a bond conditioned for the payment of an *annuity* is held to be within the statute 8 & 9 W. III. c. 11. § 8<sup>g</sup>. it seems necessary to proceed by *scire facias* on that statute, for subsequent arrears.

In an action of *debt* on bond, conditioned for the payment of money by *instalments*, where the proceedings are stayed on payment of one or more of the instalments, judgment is entered as a security for the remainder, with a stay of execution till they become due; and in such case, there seems to be no necessity for a *scire facias*, if execution be taken out within a year after each default<sup>h</sup>.

Where judgment is entered in an action of *debt* on bond, or on any penal sum, for non-performance of *covenants* or agreements in any indenture, deed or writing contained, we may remember<sup>i</sup>, that by the statute 8 & 9 W. III. c. 11. § 8. it remains as a security to answer such damages as shall or may be sustained, for further breach of any covenant or covenants in the same indenture, deed or writing contained; and the statute further directs, that “ the plaintiff may have a *scire facias* upon the said judgment against the defendant, or against his heir, tertenants, executors or administrators, suggesting other breaches of the said covenants  
“ or

<sup>f</sup> 2 Blac. Rep. 1111.

<sup>g</sup> *Ante*, 511.

<sup>h</sup> 2 Str. 814. 957. 2 Blac.

Rep. 706. 958. Barnes, 288.

*Ante*, 485.

<sup>i</sup> *Ante*, 510.

“ or agreements, and to summon him or them re-  
 “ spectively to shew cause, why execution should  
 “ not be had or awarded upon the said judgment<sup>k</sup>;  
 “ upon which there shall be the like proceeding,  
 “ as in the action of *debt* upon the said bond or  
 “ obligation, for assessing damages upon trial of  
 “ issues joined upon such breaches, or inquiry  
 “ thereof upon a writ to be awarded in manner as  
 “ therein directed; and that upon payment or satis-  
 “ faction of such future damages, costs and charges,  
 “ all further proceedings on the said judgment are  
 “ again to be stayed, and so *toties quoties*, and the  
 “ defendant, his body lands or goods, shall be dis-  
 “ charged out of execution.”

*Fourthly*, with regard to *future* effects, it is enacted by the statute 5 *Geo.* II. c. 30. § 9. that “ in case  
 “ any commission of *bankruptcy* shall issue against  
 “ any person or persons, who shall have been dis-  
 “ charged by virtue of that act, or shall have com-  
 “ pounded with his, her or their creditors, or de-  
 “ livered to them his, her or their estate or effects,  
 “ and been released by them, or been discharged  
 “ by any act for the relief of insolvent debtors, then  
 “ and in either of those cases, the body and bodies  
 “ only of such person and persons conforming as  
 “ therein mentioned, shall be free from arrest and  
 “ imprisonment, by virtue of that act; but the  
 “ *future*

<sup>k</sup> Append. Chap. XLII. § 46.

“ *future* estate and effects of every such person and  
 “ persons shall remain liable to his, her or their  
 “ creditors, as before the making of that act ;  
 “ (the tools of trade, necessary household goods  
 “ and furniture, and necessary wearing apparel of  
 “ such bankrupt, and his wife and children, only  
 “ excepted,) unless the estate of such person or  
 “ persons, against whom such commission shall be  
 “ awarded, shall produce clear after all charges,  
 “ sufficient to pay every creditor under the said  
 “ commission, *fifteen* shillings in the pound for  
 “ their respective debts.” Upon this statute it has  
 been holden, that though a prior commission be  
 superseded by consent, a second bankruptcy does  
 not protect future effects, unless fifteen shillings in  
 the pound are paid under the second commission<sup>1</sup>.

The judgment against a *bankrupt*, under the  
 above circumstances, is *general*, if given before he  
 has obtained his certificate under the second com-  
 mission ; or if given afterwards, it may be *special*,  
 against his future estate and effects, with the ex-  
 ceptions in the statute. On a general judgment, the  
 plaintiff it seems cannot sue out a special execu-  
 tion against the future effects of the bankrupt, such  
 an execution not being warranted by the judg-  
 ment<sup>m</sup>. But where the defendant, having given a  
 warrant of attorney to confess a judgment, took the  
 benefit

<sup>1</sup> Doug. 46.

<sup>m</sup> 1 T. R. 80.

benefit of an insolvent act, and then became bankrupt and obtained his certificate; after which the plaintiff entered up a *general* judgment, and sued out a *general* execution against his effects; the court of Common Pleas held the proceedings to be regular, and that no *scire facias* was necessary, to authorize either the judgment or execution; no dividend appearing to have been made, nor any goods taken under the execution more than the plaintiff was entitled to".

Where a writ of *scire facias* is necessary, as where the judgment has been given more than a year, and the defendant in the mean-time has been taken in execution, and discharged upon obtaining his certificate, the *scire facias* should state the judgment, and the circumstances which make the defendant's future estate and effects liable to satisfy it, as that he was before a bankrupt, or had compounded with his creditors, &c.; and in particular, it is necessary to aver, that the bankrupt's estate had not paid fifteen shillings in the pound under the second commission, at the time of suing out the writ: It then states, that the defendant has become seised or possessed of some estate or effects; and commands the sheriff, that he make known to the defendant, to appear in court at the return-day, to shew why the plaintiff should not have execution of the debt or damages, to be levied of the estate and



and effects, whereof the defendant hath become seised or possessed, since the obtaining of his certificate under the last commission, except his tools, &c.

By the *Lords'* act, (32 *Geo.* II. c. 28. § 17. 20.) we may remember<sup>o</sup>, that “notwithstanding any discharge obtained by virtue of that act, for the person of any prisoner, the judgment obtained against every such prisoner shall continue and remain in force, and execution may at any time be taken out thereon, against the lands, tenements, rents or hereditaments, goods or chattels of any such prisoner, other than and except the necessary wearing apparel and bedding for himself and family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l.* in value in the whole, as if he had never been before arrested, taken in execution, and released out of prison.” And it has been determined, that the effects acquired by an *insolvent*, after his discharge under the 34 *Geo.* III. c. 69. are liable to be taken in execution, for a debt due before<sup>p</sup>.

On a *general* judgment, obtained against a defendant, before his discharge under an insolvent act, no special execution can be taken out, without first suing out a *scire facias*<sup>q</sup>. And where a warrant

<sup>o</sup> *Ante*, 978.

<sup>q</sup> 1 T. R. 79.

<sup>p</sup> 6 T. R. 366. *Ante*, 978.



warrant of attorney was given, before the passing of an insolvent act, of which the defendant was entitled to take advantage by pleading in discharge of his person, &c. it was holden, that a *general* judgment signed by virtue of such warrant of attorney, after the defendant's discharge, would not warrant a *special* execution under the act<sup>r</sup>. But it seems that in this case, a *general* execution, pursuing the judgment, would be regular; and that a *scire facias* is unnecessary<sup>s</sup>.

In the case of an *executor* or *administrator*, the judgment against him is either upon the plaintiff's confession of the plea of *plene administravit*, or *plene administravit præter*, for the debt or damages and costs, to be levied as to the whole or in part, of the goods of the testator or intestate, which shall afterwards come to the hands of the defendant to be administered; which is called a judgment of assets *quando acciderint*: or it is after a verdict, demurrer, or issue of *nul tiel record*, or by confession of the defendant, or *nihil dicit*, for the debt or damages and costs, to be levied of the goods of the testator or intestate, in the hands of the defendant, if he hath so much thereof in his hands to be administered, and if not, then the costs to be levied of his own proper goods<sup>t</sup>.

In

<sup>r</sup> 1 T. R. 79.

B. 3 Bos. & Pul. 185. C. P.

<sup>s</sup> *Per Cur.* H. 41 G. III. K.

<sup>t</sup> 4 T. R. 648. 7 T. R. 359.

In the first case, the judgment appears to be founded on the opinion of the court in *Mary Shipley's* case<sup>u</sup>, where it was held, that upon a plea of *plene administravit*, the plaintiff may have judgment for his debt presently, for thereby the defendant confesses the debt; but he cannot have execution, until the defendant have goods of the deceased, when he may either sue out a *scire facias*<sup>v</sup>, or bring an action of *debt* upon the judgment, suggesting a *devastavit*: And though this opinion was questioned, in the case of *Dorchester v. Webb*<sup>w</sup>, yet in a subsequent case<sup>x</sup> it was established, and has ever since been adhered to. So in *debt* against an heir, if he plead nothing by descent, the plaintiff may have judgment presently, and a *scire facias* when assets descend<sup>y</sup>. But by taking judgment of assets *quando acciderint*, the plaintiff admits that the defendant has fully administered to that time; and therefore on a *scire facias*, or action of *debt* on the judgment, suggesting a *devastavit*, the court will not allow the plaintiff to give any evidence of effects come to the defendant's hands before the judgment<sup>z</sup>. And for the same reason, the *scire facias* on a judgment  
of

<sup>u</sup> 8 Co. 134.

2 Keb. 606. 621. 631. 666.

<sup>v</sup> Append. Chap. XLII. § 48.

671. S. C. Hob. 199. S. P.

<sup>w</sup> Cro. Car. 372.

and see 7 T. R. 29.

<sup>x</sup> *Nelson v. Noell* and others,<sup>y</sup> 8 Co. 134.

2 Saund. 226. 1 Sid. 448.

<sup>z</sup> Bul. N<sup>o</sup>. Pri. 169.

1 Lev. 286. 1 Vent. 94, 5.

of assets *quando acciderint*, must only pray execution of such assets as have come to the defendant's hands since the former judgment; and if it pray execution of assets generally, it cannot be supported<sup>a</sup>. Where, upon a suggestion of assets, a *scire facias* was taken out, and assets were found for part, judgment was given to recover so much immediately, and the residue of assets *in futuro*<sup>b</sup>.

In proceeding upon a judgment against an executor or administrator, after verdict, &c. it is usual for the plaintiff to sue out a *feri facias de bonis testatoris, si, &c. et si non, de bonis propriis*, according to the judgment<sup>c</sup>; upon which the sheriff, if he cannot execute the writ according to its tenor, either returns *nulla bona* generally, or *nulla bona* and a *devastavit* by the defendant<sup>d</sup>. On the latter return, the plaintiff, we have seen<sup>e</sup>, may have execution immediately against the defendant, by *capias ad satisfaciendum*, or *feri facias de bonis propriis*: But on the former, the ancient course was to issue a special writ, for the sheriff to inquire whether the defendant had wasted any of the goods of the deceased<sup>f</sup>: And if a *devastavit* were found, and returned by the sheriff, a *scire facias* issued for the defendant to shew cause, why the plaintiff should

<sup>a</sup> 6 T. R. 1.

<sup>b</sup> *Perryman & Westwood*,  
cited in Vent. 95. & 1 Sid.  
448.

<sup>c</sup> Cro. Eliz. 887.

<sup>d</sup> *Thes. Brev.* 116, 17.

<sup>e</sup> *Ante*, 933.

<sup>f</sup> Cro. Eliz. 859. 887.

should not have execution *de bonis propriis*; to which *scire facias* the defendant might appear, and plead *plene administravit*<sup>g</sup>. But now, for the sake of expedition, the inquiry and *scire facias* are made out in one writ, which is called a *scire fieri*-inquiry; reciting the judgment, *fieri facias*, and return of *nulla bona*, and after suggesting a *devastavit*, commanding the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if, &c.; and if not, then if it shall appear by inquisition<sup>h</sup>, that the defendant hath wasted the goods of the deceased, to give notice to the defendant, to appear in court at the return of the writ, to shew cause why the plaintiff ought not to have execution *de bonis propriis*<sup>i</sup>: And there must be the same notice of executing such writ, as of a common writ of inquiry<sup>j</sup>. This method however, though preferable to the old one, is seldom pursued at this day; as the plaintiff is not allowed any costs, unless the defendant appear and plead, or there be a joinder in demurrer: And therefore it is more usual, on the return of *nulla bona* to the *fieri facias*, to bring an action of *debt* on the judgment, suggesting a *devastavit*.



The

<sup>g</sup> Cro. Eliz. 859. 887. Lil. XLII. § 47.

Ent. 667.

<sup>j</sup> Gilb. Cas. 95. 1 Str. 235.

<sup>h</sup> Append. Chap. XLII. § 69. 623. 2 Ld. Raym. 1382. 8

<sup>i</sup> Thes. Brev. 236, &c. Lil. Mod. 366. S. C. Cas. Pr. C. Ent. 666. Append. Chap. P. 1.

The *scire facias*, upon a change of parties, is governed by the rule laid down in the case of *Penoyer v. Brace*<sup>k</sup>, that where a new person is to be benefited or charged by the execution of a judgment, there ought to be a *scire facias* to make him party to the judgment; but where the execution is not beneficial or chargeable to a person, who was not party to the judgment, a *scire facias* is unnecessary. On this rule depend the cases of *marriage*, *bankruptcy*, and *death*: and first, of *marriage*.

If a *feme-sole* obtain judgment, or there be judgment against her, and she afterwards marry before execution, there must be a *scire facias* for or against husband and wife, in order to execute the judgment. And in a modern case<sup>l</sup> it was holden, that the husband cannot have execution for the costs, on a plea of coverture found for his wife, sued as a *feme-sole*, without a *scire facias*; it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process, without a *scire facias*. In a *scire facias* by baron and feme, upon a judgment recovered by the feme *dum sola*, the plaintiffs should state their marriage<sup>m</sup>; but they need not allege it with a venue, this being only matter of surmise, to which no venue is necessary<sup>n</sup>.

If

<sup>k</sup> 1 Ld. Raym. 245. 1 Salk. 319, 20. S. C. and see 2 Inst. 471. 2 Ld. Raym. 768.

<sup>l</sup> Doug. 637.

<sup>m</sup> Append. Chap. XLII. § 50.

<sup>n</sup> 2 Str. 775. 2 Ld. Raym. 1504. 1 Barnard. K. B. 16. S. C. and see 2 H. Blac. 145.

7 T. R. 245.



If husband and wife obtain judgment, for the proper debt of the wife, and afterwards the wife die before execution, the husband alone may have a *scire facias*, without taking out administration<sup>n</sup>; for by the judgment, the nature of the debt is altered, and it is become a debt to the husband. So if execution be awarded to the husband and wife, on a judgment obtained by the wife *dum sola*, for her own proper debt, the husband alone may have a *scire facias* after his wife's death<sup>o</sup>; for though the award of execution does not alter the nature of the debt, yet it alters the property, and vests it in the husband jointly with his wife. And, in like manner, if judgment be obtained against a *feme-sole*, and she marry, and then the plaintiff sue out a *scire facias* against husband and wife<sup>p</sup>, and have judgment *quod habeat executionem* against both, and afterwards the wife die, the plaintiff may sue out a *scire facias*, and have execution against the husband<sup>q</sup>. But if husband and wife obtain judgment, for a debt due to the wife as executrix, and then the wife die before execution, the husband cannot have a *scire facias* upon the judgment<sup>r</sup>; for though he was privy to the judgment, he shall not have the

<sup>n</sup> Cro. Eliz. 844. 1 Sid. § 51.

337. 1 Mod. 179.

<sup>q</sup> 3 Mod. 186. Carth. 30.

<sup>o</sup> 1 Salk. 116. Carth. 415. Comb. 103. S. C.

Comb. 455. Skin. 682. S. C.

<sup>r</sup> Cro. Car. 207. 227. W.

<sup>p</sup> Append. Chap. XLII.

Jon. 248. S. C.

the thing recovered, but it belongs to the succeeding executor or administrator.

Secondly, of *bankruptcy*. If the plaintiff become bankrupt, after interlocutory and before final judgment<sup>s</sup>, or after final judgment and pending a writ of error<sup>t</sup>, his assignees may proceed to final judgment or affirmance, in the bankrupt's name. And where the plaintiff became bankrupt after judgment, and a writ of error allowed, it was determined that his assignees could not sue out a *scire facias* in their own names, to compel an assignment of errors, but must go on with the writ of error in the bankrupt's name, till judgment<sup>u</sup>. It was formerly holden, that if the plaintiff became bankrupt, after final judgment or affirmance, and before execution, the assignees must have sued out a *scire facias*<sup>v</sup>. And a *scire facias* by the assignees of a bankrupt, stating that he became bankrupt, within the true intent and meaning of the statutes, &c. and that his effects were afterwards in due manner assigned to the plaintiffs, was deemed sufficiently certain; without alleging the particular requisites necessary to support a commission, or that the party

was

<sup>s</sup> 2 Wils. 372.

2 T. R. 45. where a *scire facias*

<sup>t</sup> 1 T. R. 463. 2 T. R. 45.

issued, upon a bankruptcy happening between interlocutory

<sup>u</sup> 1 T. R. 463.

and final judgment.

<sup>v</sup> 1 Mod. 93. 1 Vent. 173.

S. C. and see 2 Wils. 372, 78.

was declared a bankrupt, or his effects assigned by deed, and without making a *profert in curiâ* of the deed of assignment <sup>w</sup>. But where the plaintiff became bankrupt, after he had revived the judgment by *scire facias*, the court ordered the special matter to be entered, to entitle his assignee to the benefit of the judgment on the *scire facias*, without bringing a new *scire facias* <sup>x</sup>. And in a late case <sup>y</sup>, where the plaintiff became bankrupt between interlocutory and final judgment, and sued out execution in his own name, the court refused to set aside the proceedings.

Thirdly, of *death*; which may be considered either as it happens before, or after final judgment. At common law, the death of a sole plaintiff or defendant, at any time before *final* judgment, would have abated the suit. But now, by the statute 17 *Car. II. c. 8.* for the avoiding of unnecessary suits and delays, it is enacted, that “ in all  
“ actions personal, real or mixed, the death of ei-  
“ ther party, *between the verdict and the judgment*,  
“ shall not be alleged for error; so as such judg-  
“ ment be entered within two terms after the ver-  
“ dict.” Upon this statute, the judgment is entered for or against the party, as though he were alive <sup>z</sup>; and it should be entered, or at least signed <sup>a</sup>,  
within

<sup>w</sup> 2 T. R. 45. and see Append. Chap. XLII. § 52.      <sup>y</sup> 3 T. R. 437.

<sup>z</sup> 1 Salk. 42.

<sup>x</sup> 5 Mod. 88.

<sup>a</sup> 1 Sid. 385. Barnes, 261.

within two terms after the verdict. But there must be a *scire facias* to revive it, before execution <sup>b</sup>: And such *scire facias*, pursuing the form of the judgment, should be general <sup>c</sup>, as on a judgment recovered by or against the party himself.

By a subsequent statute <sup>d</sup>, it is enacted, that “ in  
 “ all actions to be commenced in any court of re-  
 “ cord, if the plaintiff or defendant happen to die,  
 “ *after interlocutory, and before final judgment*, the  
 “ action shall not abate by reason thereof, if such  
 “ action might have been originally prosecuted or  
 “ maintained by or against the executors <sup>1</sup> or ad-  
 “ ministrators of the party dying; but the plaintiff,  
 “ or if he be dead after such interlocutory judg-  
 “ ment, his executors or administrators, shall and  
 “ may have a *scire facias* against the defendant, if  
 “ living after such interlocutory judgment, or if  
 “ he died after, then against his executors or ad-  
 “ ministrators, to shew cause why damages in such  
 “ action should not be assessed and recovered by  
 “ him or them <sup>e</sup>. And if such defendant, his exe-  
 “ cutors or administrators, shall appear at the re-  
 “ turn of such writ, and not shew or allege any  
 “ matter sufficient to arrest the final judgment, or  
 “ being returned warned, or upon two writs of  
 “ *scire facias*, it be returned that the defendant, his  
 executors

<sup>b</sup> 1 Wils. 302.

§ 6.

<sup>c</sup> 2 Ld. Raym. 1280.

<sup>e</sup> Append. Chap. XLII.

<sup>d</sup> Stat. 8 & 9 W. III. c. 11. § 53, &c.

“ executors or administrators, had nothing where-  
 “ by to be summoned, or could not be found in the  
 “ county, shall make default, that thereupon a writ  
 “ of inquiry of damages shall be awarded; which  
 “ being executed and returned, judgment final  
 “ shall be given for the said plaintiff, his executors  
 “ or administrators, prosecuting such writ or writs  
 “ of *scire facias*, against such defendant, his exe-  
 “ cutors or administrators, respectively <sup>f</sup>.” This  
 statute has been held not to extend to cases where  
 the party dies before interlocutory judgment;  
 though it be after the expiration of the rule to  
 plead <sup>g</sup>.

Where either party dies after interlocutory judg-  
 ment, and before the execution of the writ of in-  
 quiry, the *scire facias* upon this statute ought to  
 be for the defendant, or his executors or adminis-  
 trators, to shew cause why the damages should not  
 be *assessed*, and recovered against them <sup>h</sup>, and to  
 hear the judgment of the court thereupon <sup>i</sup>. But  
 where the death happens after the writ of inquiry  
 is executed, and before final judgment, the *scire*  
*facias* must be to shew cause, why the damages as-  
 sessed by the jury should not be *adjudged* to the  
 plaintiff, or his executors or administrators <sup>k</sup>.

The

<sup>f</sup> Append.Chap. XLII. § 76.

<sup>i</sup> 6 Mod. 144.

<sup>g</sup> 1 Wils. 315.

<sup>k</sup> 1 Wils. 243. and see 1 T.

<sup>h</sup> Lil. Ent. 647.

R. 388.



The judgment upon this statute is not entered for or against the party himself, as upon the 17 *Car.* II. but for or against his executors or administrators<sup>1</sup>. And where the defendant dies, after interlocutory and before final judgment, two writs of *scire facias* must be sued out by the plaintiff, before he can have execution; one before the final judgment is signed, in order to make the executors or administrators parties to the record; the other after final judgment is signed, in order to give them an opportunity of pleading no assets, or any other matter in their defence: for it would be unreasonable that the executors or administrators should be in a worse situation, where their testator or intestate died before the final judgment was signed, than they would have been in, if he had died afterwards<sup>m</sup>.

Where there were two or more plaintiffs or defendants in a personal action, the death of one or more of them *pending the suit*, would formerly in some cases have abated it<sup>n</sup>. But now, by the statute 8 & 9 *W.* III. c. 11. § 7. “if there be two or  
“ more plaintiffs or defendants, and one or  
“ more of them die, if the cause of action shall  
“ survive to the surviving plaintiff or plaintiffs, or  
“ against the surviving defendant or defendants,  
“ the

<sup>1</sup> Salk. 42.<sup>n</sup> Cro. Jac. 19. Carter, 193.<sup>m</sup> Say. Rep. 266.

3 Mod. 249.

“ the writ or action shall not be thereby abated ;  
 “ but such death being suggested upon the record,  
 “ the action shall proceed, at the suit of the sur-  
 “ viving plaintiff or plaintiffs, against the surviving  
 “ defendant or defendants.” In such case, if the  
 death happen before issue joined, it should be sug-  
 gested in making up the issue ; but otherwise it  
 need not be suggested, till the plea-roll is made  
 up °. And where one of two plaintiffs died before  
 interlocutory judgment, and the suit notwithstand-  
 ing went on to execution in the name of both ; on  
 a motion to set aside the proceedings for this irre-  
 gularity, the court permitted the surviving plain-  
 tiff to suggest the death of the other on the roll,  
 and to amend the *capias ad satisfaciendum*, without  
 paying costs <sup>p</sup>. But as no new person is introduced,  
 there is no occasion for a *scire facias* in these cases,  
 to revive the judgment.

Where there were two or more defendants, and  
 one of them died *after judgment*, and before exe-  
 cution, it was formerly holden <sup>q</sup>, that the plaintiff  
 was put to his *scire facias*, against the personal re-  
 presentatives of the deceased. But it was afterwards  
 determined, that in such case a *scire facias* would  
 lie against the survivor alone, reciting the death <sup>r</sup> ;  
 and

° 1 Bur. 363.

<sup>p</sup> 5 T. R. 577.

<sup>q</sup> Yelv. 208.

<sup>r</sup> Append. Chap. XLII.

§ 57. T. Raym. 26. 1 Lev. 30.

1 Keb. 92. 123. S. C. Carth.

106. S. C. cited.

and he could not plead, that the heir of the deceased had assets by descent, and pray judgment if he ought to be charged alone : for at common law, the charge upon the judgment, being personal, survived ; and the statute of *Westm.* 2. which gives an *elegit*, does not take away the common-law remedy ; and therefore the plaintiff may take out his execution, which way he pleases : But if he should, after the allowance of this writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela* <sup>s</sup>. And it is now settled, that where there are two or more plaintiffs or defendants in a personal action, and one or more of them die after judgment, execution may be had for or against the survivors, without a *scire facias* <sup>t</sup> : But the execution in such case should be taken out in the joint names of all the plaintiffs or defendants <sup>u</sup> ; otherwise it will not be warranted by the judgment.

Where there is only one plaintiff or defendant, who dies *after final judgment*, and before execution, a *scire facias* may be had by or against his  
*personal*

<sup>s</sup> 3 Bac. Abr. 698. 4 Bac. Comb. 441. 5 Mod. 338. Abr. 419. Show. 402. S. C. 3 Salk. 319.

<sup>t</sup> Moor, 367. Noy, 150. Carter, 112. 193. 1 Ld. Raym. 7 Mod. 68. S. P. <sup>u</sup> 1 Ld. Raym. 244. 1 Salk. 244. 1 Salk. 319. Carth. 404. 319. S. C.

*personal* representatives; and upon the death of the party against whom the judgment is given, the other party may proceed by *scire facias* against his *heir* and *tertenants*.

The personal representatives are the executor or administrator of the deceased; or if there be more than one, the executors or administrators, and the survivors of them: And the executor of an executor is considered as the representative of the first testator. If any of the executors or administrators are feme-coverts, their husbands must be made parties to the *scire facias*: And though an executor or administrator become bankrupt, yet he may still proceed by *scire facias*; as the bankruptcy does not affect him in his representative character. But the administrator of an executor, claiming by the act of the ordinary, does not represent the original testator<sup>v</sup>; nor does the executor or administrator of an administrator represent the first intestate. Therefore, when an executor dies intestate, or after the death of an administrator, it is necessary to take out administration *de bonis non*, or of such goods as are left unadministered<sup>w</sup>.

At common law, an administrator *de bonis non*, claiming by title paramount, could not have had a *scire facias*, or otherwise proceeded on a judgment recovered

<sup>v</sup> 1 Bos. & Pul. 310.

<sup>w</sup> *Id. ibid.*

recovered *by* an executor or administrator; but it was otherwise in the case of a judgment recovered *against* an executor or administrator<sup>x</sup>. And now, by the statute 17 *Car.* II. c. 8. § 2. “Where any judgment after a verdict shall be had, by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment.” On this statute it has been holden, that an administrator *de bonis non* may not only commence an execution, on a judgment obtained by an executor or administrator, but may perfect an execution already begun<sup>y</sup>. But still, if an executor bring a *scire facias* on a judgment or recognisance, and get judgment *quod habeat executionem*, and die intestate, the administrator *de bonis non* must bring a *scire facias* upon the original judgment, and cannot proceed upon the judgment in the *scire facias* <sup>z</sup>.

The *scire facias* on a judgment by the personal representatives states, in addition to the judgment, the death of the testator or intestate, as the court have been informed by the person suing it out, who is described as his executor or administrator<sup>a</sup>: If the writ be brought against personal representatives,

<sup>x</sup> 1 Rol. Abr. 890. W. Jon.

<sup>z</sup> 2 Ld. Raym. 1049.

214. Cro. Car. 167. S. C.

<sup>a</sup> Append. Chap. XLII. §

<sup>y</sup> 1 Salk. 323.

58. 60.



tives, it states that the testator died, having made the defendant his executor, or in the case of an administrator, the death of the intestate, and the grant of administration; and is for the defendant to shew why the plaintiff should not have execution of the debt or damages, to be levied of the goods and chattels which were of the testator or intestate at the time of his death, in the defendant's hands to be administered, &c <sup>b</sup>. In a *scire facias* on a judgment recovered by an executor, the death of the testator need not be expressly averred <sup>c</sup>.

Upon the return of *nihil* to a writ of *scire facias* against the personal representatives the plaintiff may have a *scire facias* against the *heir* of the defendant, either alone or jointly with the *tertenants*, or tenants of the lands whereof the defendant was seised at the time of the judgment, or at any time afterwards <sup>d</sup>: But where judgment is had against one who dies before execution, a *scire facias* will not lie against his heir or ter tenants, until a *nihil* be returned against his executors or administrators <sup>e</sup>; and as the heir in this case is charged as *tertenant* <sup>f</sup>, the plaintiff can only have execution of a moiety of his land <sup>g</sup>, even where he pleads a false plea <sup>h</sup>.

In

<sup>b</sup> Append. Chap. XLII. § 59. 61.

<sup>c</sup> 1 Str. 631. 2 Ld. Raym. 1395. S. C.

<sup>d</sup> 2 Wms. Saund. 7. (4) and see *id.* 8. (9.) for the definition of *ter-tenants*.

<sup>e</sup> Carth. 107. 2 Wms. Saund. 72. o. p.

<sup>f</sup> 3 Co. 12. Cro. Car. 295. 312.

<sup>g</sup> 2 Wms. Saund. 7 (4.)

<sup>h</sup> *Id. ibid.* Cro. Car. 296. Carth. 93.

In a *scire facias* against the heir and tertenants, the heir cannot object that the *scire facias* ought first to have issued against him<sup>i</sup>. But it seems to be the better opinion, that the tertenants alone are not to be charged until the heir be summoned, or it be returned that there is no heir, or that the heir hath not any lands to be charged<sup>k</sup>; for the heir may have a release to plead, or other matter in bar of execution: and his land is rather to be charged than the land of the tertenants, for the heir shall not have contribution against the tertenants, as they shall against him; also if the heir be within age, the *parol* shall demur, and the tertenants shall have advantage of it<sup>l</sup>.

Where there are *several* defendants, and one of them dies before execution, since the charge upon the judgment survives as to the personalty, though not as to the realty<sup>m</sup>, the plaintiff may have a *scire facias*, framed upon the special matter, *viz.* against the survivor, to shew why the plaintiff should not have execution against him, of his goods and chattels, and of a moiety of his lands, and against the heir and tertenants of the deceased, to shew why the plaintiff should not have execution of a moiety of the deceased's lands, without mentioning any goods<sup>n</sup>.

The

<sup>i</sup> Cro. Eliz. 896. 2 Wms. Saund. 7. (4).

Saund. 72. *p.*

<sup>m</sup> *Ante*, 1028, 9.

<sup>k</sup> 2 Wms. Saund. 8. (8).

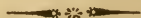
<sup>n</sup> Carth. 105. 2 Wms.

<sup>l</sup> Bac. Abr. tit. *Scire facias*, Saund. 72. *p.*

C. 5. Cro. Car. 295. 2 Wms.

The *scire facias* against the tertenants is either *general*, against all the tertenants, without naming them; or *special*, setting forth their names<sup>o</sup>. But if a plaintiff undertake to name them, he must name them all; and if he do not, those who are named may plead in abatement<sup>p</sup>.

There is also another writ of *scire facias*, which lies against tertenants, upon a writ of error to reverse a fine or recovery<sup>r</sup>. This writ is said by lord *Holt* to be discretionary, and not *stricti juris*; but yet to have been the constant and usual course of the court, and therefore not to be departed from. To this writ the tertenants can only plead a release of errors, to defend their own possession, or for the sake of purchasers; but they cannot plead in abatement of the writ, because they are not parties to the suit<sup>r</sup>. And there is no necessity in such case, for a *scire facias* against the heir<sup>s</sup>.



Having hitherto treated of the writs of *scire facias*, on recognisances and judgments, in what cases

<sup>o</sup> 2 Salk. 600. 1 Ld. Raym.      <sup>q</sup> Carth. 111. Skin. 273. S. 669. S. C. and see 2 Wms. C. 1 Bur. 360.

Saund. 7.(4). Append. Chap.      <sup>r</sup> Carth. 111. Skin. 273. S. XLII. § 62, &c.      C. 1 Bur. 359, 60. and see 2

<sup>p</sup> Comb. 282. 2 Wms. Wms. Saund. 72. *p*.  
Saund. 7. (4).      <sup>s</sup> 1 Bur. 412.

cases they lie, and by and against whom they may be brought, with the forms of them, distinctly; I shall now consider them together, and shew the proceedings thereon from the time of their being issued, till they are finally determined.

A *scire facias* on a recognisance of bail in the action, being an original proceeding, must be brought in *Middlesex*, where the record is; for recognisances in this court are not obligatory by the caption, as in the Common Pleas, but by being entered of record<sup>t</sup>. But in case of a recognisance entered into by bail on a writ of error, it is said, that if it be entered as taken at a judge's chambers in *Serjeants-Inn*, the *scire facias* may be sued out in *London*<sup>u</sup>. A *scire facias* to revive a judgment by or against the parties, or their personal representatives, not being an original proceeding, but a continuation of the former suit, must be brought in the county where the venue was laid in the original action, the defendants being supposed to reside in that county<sup>v</sup>: But upon a return of *nihil* to the writ against the personal

<sup>t</sup> 2 Salk. 564. 600. 659. P. but see 1 East, 603.

6 Mod. 42. 132. 7 Mod. 120,      <sup>u</sup> 8 Mod. 290. R. E. 5 Geo. 21. R. E. 5 Geo. II. Reg. 3. II. Reg. 3. a. Lil. Ent. 520.

a. 1 Bur. 409. K. B. Hob. 195.      <sup>v</sup> Hob. 4. Yelv. 218. Cro. Brownl. 69. Moor, 883. S. C. Jac. 331. S. C. R. E. 5 Geo. Sty. Rep. 9. Aleyn, 12. S. C. II. Reg. 3. a.

2 Lutw. 1287. Barnes, 97. C.

sonal representatives, the plaintiff upon a *testatum*, may have a *scire facias* against the heir and tertenants in a different county <sup>w</sup>.

The *scire facias* upon a recognisance against bail in the action, where the proceedings are by *bill*, ought to be tested on the return-day, or by *original*, on the *quarto die post* of the return of the *capias ad satisfaciendum* against the principal <sup>x</sup>. Upon a judgment, it may be tested at any time after the judgment, or first day of the term to which it relates: And it may be antedated, even in term-time, unless where it issues by rule of court <sup>y</sup>. By *bill*, the *scire facias* is made returnable before the king at *Westminster*, on a day certain <sup>z</sup>; and where there is but one writ, there need be only four days exclusive between the teste and return of it <sup>a</sup>. But every *scire facias* by *original*, ought to have fifteen days inclusive between the teste and return <sup>b</sup>; and should be made returnable on a general-return day, wheresoever, &c. <sup>c</sup>. A *scire facias* in general is not *amendable*; and therefore

<sup>w</sup> Cro. Car. 313. Carth. 105. Raym. 1417.

and see 7 T. R. 28.

<sup>a</sup> 4 T. R. 663. and see R. E.

<sup>x</sup> 6 Mod. 86. 8 Mod. 227. 5 Geo. II. Reg. 3. a.

2 Str. 866. 2 Ld. Raym. 1567.

<sup>b</sup> R. T. 8 W. III. a. E. 5

S. C. R. E. 5 Geo. II. Reg. Geo. II. Reg. 3. a.

3. a.

<sup>c</sup> 2 Lil. P. R. 499. 3 Salk.

<sup>y</sup> 2 Salk. 599.

320. 1 Str. 146. R. E. 5 Geo.

<sup>z</sup> 2 Lil. P. R. 499, &c. R. II. Reg. 3. a.

E. 5 Geo. II. Reg. 3. a. 2 Ld.



fore if it be defective in the teste or return, or vary from the record, &c. the plaintiff must move to quash it<sup>d</sup>.

The *scire facias* being sued out, is delivered to the sheriff; and if the bail or defendants live in the county into which the writ issues, the plaintiff may cause them to be *summoned* thereon; for which purpose the sheriff will make out his warrant, a copy of which should be delivered to them, or they should have some notice of the proceeding, the sufficiency of which, if disputed, must be determined by the court<sup>e</sup>. The bail may be summoned at any time before the rising of the court on the return-day<sup>f</sup>: And where the sheriff returns *scire feci*, the court will not enter into the validity of the summons upon motion, but leave the party to his action against the sheriff, for a false return<sup>g</sup>.

On the return-day of the *scire facias*, or *quarto die post* of the return by *original*, the sheriff may be called

<sup>d</sup> 1 Salk. 52. 1 Ld. Raym. 182. 548. 2 Ld. Raym. 1057. 1 Str. 401. 2 Str. 892. 1165. But there are cases in the books, where a writ of *scire facias* has been amended by the court; not only where it was bad on the face of it, by the mistake of the clerk, but also for a variance, where the defendant had not taken advantage

of it by pleading *nul tiel record*. See the cases on this subject, collected in 2 Ld. Raym. 1057. and 2 Bos. & Pul. 275.

<sup>e</sup> 2 Blac. Rep. 837.

<sup>f</sup> 1 East, 86. and see 1 Str. 644. R. E. 5 Geo. II. reg. 3. (a). but see 2 T. R. 757. *contra*.

<sup>g</sup> 2 Str. 813. 3 Bur. 1360. 1 Blac. Rep. 393. S. C.

called upon for the *return* of it; and except on a *scire facias* against the heir and tertenants, he either returns *scire feci*, or *nihil*; that he has given notice to the bail or defendants<sup>h</sup>, or that they have nothing by which he can make known to them<sup>i</sup>; or that he has given notice to one, and the other hath nothing<sup>k</sup>, &c. On a *scire facias* against the heir and tertenants, the sheriff's return is either that there are none<sup>l</sup>, or that he has warned them to appear: In the latter case, if the writ be general, the sheriff should return that he has warned certain persons, being the tenants of *all* the lands in his bailiwick, describing them; or the tenants of certain lands, and that there are no others<sup>m</sup>; a return that he has warned the tenants of all the lands generally<sup>n</sup>, or certain persons, tenants of lands in his bailiwick<sup>o</sup>, being insufficient.

Where the sheriff returns *nihil*, the plaintiff must sue out a second or *alias* writ of *scire facias*<sup>p</sup>, commanding the sheriff, as *before* he was commanded, &c.; and if upon this second writ, the sheriff also return *nihil*, and the bail or defendants do not appear,

<sup>h</sup> Append. Chap. XLII. § pend. Chap. XLII. § 71.

65.

<sup>n</sup> Carth. 105.

<sup>i</sup> *Id.* § 66.

<sup>o</sup> 2 Salk. 598. 2 Wms.

<sup>k</sup> *Id.* § 67.

Saund. 8. (7).

<sup>l</sup> *Id.* § 70.

<sup>p</sup> 2 Inst. 272. Cro. Jac. 59.

<sup>m</sup> Co. Ent. 622, 3. *Off.* 8 Mod. 227. Say. Rep. 121. *Brev.* 278. 282. 286. Hearne, Append. Chap. XLII. § 8. 72. 326. Dalt. Sher. 559. Ap-

pear, there shall be judgment against them <sup>a</sup>; two *nihils* being deemed equivalent to a *scire feci*. It was formerly usual to sue out both writs of *scire facias* together, making the teste of the second as if the first had been actually returned <sup>r</sup>: But now, there is a rule of court, that no writ of *alias scire facias* shall issue, until the first writ be returnable <sup>s</sup>.

Where there are two writs of *scire facias*, the second should be tested on the return-day, or by *original*, on the *quarto die post* of the return of the first, except in error <sup>t</sup>, or the return-day happen on a Sunday <sup>u</sup>. The *alias* should be made returnable, like the first writ, on a day-certain <sup>v</sup>, or general return-day, according to the nature of the proceedings. And by *bill*, it is sufficient if there be fifteen days inclusive between the teste of the first, and return of the second writ, without regard to the number of days between the teste and return of each <sup>w</sup>: But by *original*, there should be fifteen days inclusive between the teste and return  
of

<sup>a</sup> Dyer, 168. 198. 172. 201.

Yelv. 112. Sty. Rep. 281. 288.

323.

<sup>r</sup> 2 Salk. 599. 8 Mod. 227.

<sup>s</sup> R. T. 8 W. III. 12 Mod. 87. 7 Mod. 40. 96.

<sup>t</sup> R. T. 8 W. III. a. and  
see 4 T. R. 377.

<sup>u</sup> Dyer, 168. a.

<sup>v</sup> 2 Lil. P. R. 499, &c.

<sup>w</sup> T. Jon. 228. 2 Salk. 599.

Carth. 468. 7 Mod. 40. 8

Mod. 227. 2 Str. 765. 1139.

R. T. 8 W. III. a. R. E. 5

Geo. II. Reg. 3. a.

of the *alias*, as well as of the first writ of *scire facias*<sup>x</sup>. Every writ of *scire facias*, of which notice is given to the defendants, must be left in the sheriff's office, four days exclusive before the return<sup>y</sup>: And where there are two writs, the first should be left in the office sometime<sup>z</sup>, (generally one day,) and the *alias* four days exclusive (which must be the *last* four days<sup>a</sup>,) before the return; and the sheriff should indorse on every such writ, the day of the month it is left in his office<sup>b</sup>. But so as the second writ of *scire facias* be filed in proper time in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it be not entered in the *scire facias* book kept by the sheriff, which is merely a private book for his own convenience. 3 East, 570.

On the return of the second *scire facias*, or of the first, if *scire feci* be returned, a *rule* must be given with the clerk of the rules, for the bail or defendants to appear<sup>c</sup>, which expires in four days exclusive; within which time, they either appear or make default: In the latter case, the plaintiff is entitled to judgment<sup>d</sup>, which he may sign on the expiration of the rule: And if a man have judgment for damages against two, and sue out a *scire facias* against both, if one be returned summoned, and make default, and the other have nothing, the plaintiff may have execution against him who made

<sup>x</sup> R. E. 5 Geo. II. Reg. 3. a.

<sup>a</sup> 4 T. R. 583.

<sup>y</sup> *Williams v. Mason*, M. 4 G. II. 1 East, 89. (a). R. E.

<sup>b</sup> R. E. 5 Geo. II. Reg. 3.

5 Geo. II. Reg. 3. 3 Bur.

<sup>c</sup> *Id.* a. Append. Chap. XLII. § 73.

1723. 4 Bur. 2439.

<sup>d</sup> Com. Dig. tit. *Pleader*, 3

<sup>z</sup> *Id.* *ibid.*

L. 8, 9.

made default, for the whole<sup>e</sup>. So if it be returned that one of them is dead, he shall have execution for the whole against the other<sup>f</sup>. Judgment being signed, the proceedings in *scire facias* should be forthwith entered on a roll, and execution awarded: The *entry* of the proceedings is either against bail<sup>g</sup>, or in other cases<sup>h</sup>: And where two writs issue, returnable in different terms, the first must be entered of the term wherein it is returnable; and an award of the second is sufficient, without setting it forth at large<sup>i</sup>.

If the bail or defendants *appear* to the *scire facias*, which is signified by delivering a note in writing to the plaintiff's attorney<sup>k</sup>, a declaration must be delivered, on treble-penny stamped paper, a rule given to plead, and a plea demanded, as in other cases<sup>l</sup>.

The *declaration* in *scire facias* begins by stating that the king sent to the sheriff, his writ close in these words, (setting forth the writ *verbatim*): It then states the plaintiff's appearance at the return of the writ, and the sheriff's return thereto; and if he return *nihil*, it contains a recital of the mandatory part

<sup>e</sup> Bac. Abr. tit. *Execution*,  
G.

<sup>f</sup> *Id. ibid.*

<sup>g</sup> Append. Chap. XLII. §  
9, &c.

<sup>h</sup> *Id.* § 74, &c.

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<sup>i</sup> R. E. 5 Geo. II. Reg.  
3. a.

<sup>k</sup> Append. Chap. XLII. §  
13. 77.

<sup>l</sup> R. E. 5 Geo. II. Reg.  
3. a.

3 C



part of the second writ of *scire facias*, and goes on to state the plaintiff's appearance, in like manner, at the return of that writ, and the sheriff's return thereto: Then follows the appearance of the bail or defendants; and the declaration against *bail* concludes, by praying execution of the debt or damages recovered by *bill*, or of the sum acknowledged by *original*, according to the force, form and effect of the recognisance <sup>m</sup>; or upon a *judgment* after a year and a day, it concludes by praying execution of the debt or damages generally <sup>n</sup>; or against executors or administrators, of the debt or damages, to be levied of the goods and chattels of the original defendant, in their hands to be administered <sup>o</sup>; or against the heir and tertenants, to be levied of the lands and tenements, whereof they are returned tenants, or which have descended and come to the heir, by hereditary descent from the defendant, according to the force, form and effect of the recovery <sup>p</sup>. A declaration in *scire facias*, returnable the last return of a term, may be entitled of the same term generally <sup>q</sup>. And it is usual for executors and administrators, in declaring on a *scire facias*, to make a *profert in curiâ* of the letters testamentary, or of administration; but it may be inserted either in the middle, or at the end of the writ <sup>r</sup>.

To

<sup>m</sup> Append. Chap. XLII. § 14, 15.

<sup>n</sup> *Id.* § 78, &c.

<sup>o</sup> *Id.* § 81.

<sup>p</sup> *Id.* § 82.

<sup>q</sup> 3 Wils. 154.

<sup>r</sup> Carth. 69. 1 Show. 60. 6 Mod. 134. 7 Mod. 15.

To a *scire facias* on a recognisance or judgment, the defendant may plead in abatement or in bar, as in other actions<sup>s</sup>. On a *general* writ of *scire facias* against the heir and tertenants, if some of the tertenants only are summoned, they may plead that there are other tertenants not named, in the *same* county, and pray judgment if they ought to answer *quousque* the others be summoned, but ought not to pray *quod breve cassetur*; for the court ought never to abate the writ, but where the plaintiff can have a better writ<sup>t</sup>: But upon a *special* writ, if all the tertenants are not named in it, those who are may plead in abatement; for there, the party may have a better writ, by naming them all<sup>u</sup>: And it seems to be a good plea, that there are other tertenants not named, in *another* county<sup>v</sup>. When a tertenant is summoned, and doth not plead that there are other tertenants, not summoned or named in the writ, he shall never afterwards have a *scire facias* or *audita querela*, to compel the others to contribute<sup>w</sup>. To a *scire facias* against a tertenant, upon a judgment in *debt* or other personal action, the defendant cannot plead non-tenure generally, because it is contrary to the sheriff's return; but  
he

<sup>s</sup> 2 Inst. 470. 10 Mod. 112.

<sup>v</sup> 2 Vent. 104. Bac. Abr. tit.

<sup>t</sup> 2 Salk. 601. 6 Mod. 199.

*Scire facias*, C. 5. 2 Wms.

226. 2 Ld. Raym. 1253. 3

Saund. 8. (10).

Salk. 321. S. C. 2 Wms.

<sup>w</sup> Moor, 524. 2 Wms.

Saund. 8. (10).

Saund. 8. (10).

<sup>u</sup> *Id. ibid.*

he may plead a special non-tenure in such case, as that he has only a term for years <sup>w</sup>.

On a *scire facias* against bail in the action, they may plead *nul tiel record* of the recognisance <sup>x</sup>, or of the recovery against the principal; payment by, or a release to the principal or bail <sup>y</sup>; or that the principal rendered himself, or was rendered by his bail, before the return of the *capias ad satisfaciendum* <sup>z</sup>. They may also plead, in discharge of their liability, that there was no *capias ad satisfaciendum* sued out and returned against the principal <sup>a</sup>: and if there be a *void* writ, it is as none <sup>b</sup>. But if the writ be merely *irregular*, as if it was sued out after a year, without a *scire facias* <sup>c</sup>, or made returnable on a day out of term <sup>d</sup>, the bail cannot take advantage of the irregularity by pleading. If the principal *die*, before the return of the *capias ad satisfaciendum*, this will operate in excuse of performance, and the bail may plead it in their discharge <sup>e</sup>. So they may plead that a writ of error

<sup>w</sup> 2 Salk. 601. 3 Salk. 321.  
6 Mod. 199. 226. 2 Ld.  
Raym. 1253. S. C. and see  
Bic. Abr. tit. *Scire facias*, E.  
Com. Dig. tit. *Pleader*, 3 L.  
11.

<sup>x</sup> *Thes. Brev.* 265.

<sup>y</sup> Sty. Rep. 324. 1 Ld.  
Raym. 157. Stat. 4 Ann. c.  
16. § 12.

<sup>z</sup> 1 Ld. Raym. 156, 7.

<sup>a</sup> Sty. Rep. 281. 288. 324.

<sup>b</sup> 3 Keb. 671. 6 Mod. 304.

<sup>c</sup> 2 Ld. Raym. 1096. 6 Mod.  
304. Holt, 90. S. C.

<sup>d</sup> 2 Bur. 1187, 8.

<sup>e</sup> 1 Rol. Abr. 336 Cro. Jac.  
165. W. Jon. 139. Sty. Rep.  
324. 12 Mod. 601. 10 Mod.  
267. R. E. 5 Geo. II. Reg. 3.

a. But they cannot plead the  
*bankruptcy* and certificate of  
their principal. 1 Bos. & Pul.  
450. (b). 2 Bos. & Pul. 45.

ror was sued out and allowed, after the issuing and before the return of the *capias ad satisfaciendum* against the principal, so as to avoid proceedings against them in *scire facias* upon the recognisance of bail, prosecuted after a return by the sheriff of *non est inventus*, made pending such writ of error <sup>f</sup>.

But it is not a good plea, that the principal died before the issuing <sup>g</sup>, or after the return <sup>h</sup> of the *capias ad satisfaciendum*; for though a plea that the principal died before the writ issued, be conclusive if found for the *defendant*, yet it is not so, if found for the *plaintiff*; inasmuch as the principal might still have died after the issuing, and before the return of the writ: and where the principal dies after the return of the *capias ad satisfaciendum*, this will not discharge the bail; for upon the return of *non est inventus*, their recognisance is in strictness forfeited; and though a render afterwards, and before the return of the *scire facias*, is allowed, yet that is merely *ex gratiâ*, and not *ex debito justitiæ*, and therefore cannot be pleaded <sup>i</sup>. Where the principal died after a *capias ad satisfaciendum* returned, and before it was filed, the court on motion would have formerly stayed the filing of it, in favour of the bail <sup>k</sup>: But in a late case it was  
holden,

<sup>f</sup> 2 East, 439.

Say. Rep. 121. 2 Wils. 67.

<sup>g</sup> 10 Mod. 267. 303.

<sup>i</sup> *Ante*, 238, 9.

<sup>h</sup> 12 Mod. 112. 236. 8 Mod.

<sup>k</sup> 1 Lil. P. R. 183. and see

31. 1 Str. 511. S. C. 2 Ld. R. E. 5 Geo. II. Reg. 3. a. 2

Raym. 1452. 2 Str. 717. S. C. Crompt. 88. 1 Rich. Pr. 445.

holden, that if the principal die after the return of the *capias ad satisfaciendum*, and before the return is filed, the bail are fixed; and the court will not stay the filing of the return<sup>1</sup>. To a plea of the death of the principal, before the return of the *capias ad satisfaciendum*, the plaintiff in his replication must set forth the writ, and that the principal was alive at the return of it<sup>m</sup>; and such replication must conclude with an averment<sup>n</sup>.

If a *scire facias* be brought on a judgment, the defendant may plead *nul tiel record* of the recovery<sup>o</sup>, payment<sup>p</sup>, or a release<sup>q</sup>; or that the debt or damages were levied on a *feri facias*<sup>r</sup>, the defendant's lands extended for them upon an *elegit*<sup>s</sup>, or his person taken in execution on a *capias ad satisfaciendum*<sup>t</sup>. But it is a rule, that the defendant cannot plead any matter to the *scire facias* on a judgment, which he might have pleaded in the original action<sup>u</sup>. If the *scire facias* be brought against an executor or administrator, he may plead *plene administravit*; but then, the judgment being entitled

<sup>1</sup> 6 T. R. 284. *Ante*, 994.

<sup>m</sup> Carth. 4.

<sup>n</sup> 2 Wils. 65. Doug. 58. 2

T. R. 576.

<sup>o</sup> *Off. Brev.* 279. *Mod. Int.* 368.

<sup>p</sup> Stat. 4 Ann. c. 16. § 12.

<sup>q</sup> 3 Lev. 272.

<sup>r</sup> 4 Leon. 194. Sav. 123.

Cro. Car. 328. Clift, 675.

<sup>s</sup> Dyer, 299. b. 1 Lev. 92.

<sup>t</sup> *Off. Brev.* 300. 1 Salk. 271.

*Ante*, 957. but see 1 Lutw. 641, 3.

<sup>u</sup> Cro. Eliz. 283. 588. 1 Sid.

182. 1 Salk. 2. 2 Str. 1043.

Cas. temp. Hardw. 233. S. C.

Cowp. 727.



entitled to a preference, he must shew in what manner he has administered<sup>v</sup>. And where, in an action against an executor, the plaintiff dies after interlocutory and before final judgment, the defendant cannot plead to the *scire facias* for assessing damages, a judgment upon bond against his testator, and no assets *ultra*; for the statute never intended that the executor should be in a better situation, as to the assessing of damages upon the inquiry, than his testator, who could have pleaded nothing but a release, or other matter in bar, arising *puis darrein continuance*<sup>w</sup>. All pleas and demurrers, upon writs of *scire facias*, ought to be delivered; and all issues<sup>x</sup> thereon made up by the attornies<sup>y</sup>.

Where the party has a release, or other matter which he might have pleaded to the *scire facias* in his discharge, and for want of pleading it, execution is awarded upon a *scire feci* returned, he is estopped for ever, and cannot by any means take advantage

<sup>v</sup> 1 Ld. Raym. 3, 4.

<sup>w</sup> 1 Salk. 315. 6 Mod. 142. S. C. but *quære* whether the interlocutory judgment in this case was not obtained against the testator, and he dying, the *scire facias* issued against his executor?

<sup>x</sup> For the form of the issue in *scire facias* against bail, see Append. Chap. XLII. § 16. and for the entry of issue, and award of execution, &c. after verdict, see *id.* § 17.

<sup>y</sup> R. T. 12 W. III. a. *Ante*, 666.

advantage of that matter<sup>z</sup>. But where execution is awarded on two *nihil*s returned, he may relieve himself by *audita querela*, though not by writ of error<sup>a</sup>: And where the case is clear, and the application recent, the court will interpose in a summary way, and relieve the party upon motion<sup>b</sup>, without putting him to an *audita querela*. But they will never do it, where the fact is disputed<sup>c</sup>; or there has been a long acquiescence, and several steps have been taken subsequent to the award of execution<sup>d</sup>.

No *damages* are recoverable in *scire facias*, for delay of execution<sup>e</sup>; and the parties were consequently not entitled to *costs*, until the statute 8 & 9 W. III. c. 11. § 3. by which it is enacted, that  
 “ in all suits upon any writ or writs of *scire facias*,  
 “ the plaintiff obtaining an award of execution af-  
 “ ter plea pleaded, or demurrer joined therein,  
 “ shall recover his costs of suit; and if the plain-  
 “ tiff shall become nonsuit, or suffer a disconti-  
 “ nuance, or a verdict shall pass against him, the  
 “ defendant shall recover his costs, and have exe-  
 “ cution for the same by *capias ad satisfaciendum*<sup>f</sup>,  
 “ *fieri facias*<sup>g</sup> or *elegit*,” with a proviso, that the  
 statute

<sup>z</sup> F. N. B. 104. 1 Salk. 93.  
 264. 1 Wils. 98.

<sup>a</sup> Sty. Rep. 281. 288. 323.  
 1 Salk. 262. 4 Mod. 314. S.  
 C. 1 Str. 197.

<sup>b</sup> 2 Ld. Raym. 1295. Barnes,  
 277.

<sup>c</sup> 2 Str. 1198.

<sup>d</sup> *Id.* 1075.

<sup>e</sup> 3 Bur. 1791.

<sup>f</sup> Append. Chap. XLII. §  
 25, &c.

<sup>g</sup> *Id.* § 18, &c.

statute shall not extend to executors or administrators <sup>h</sup>. This statute does not apply to a *scire facias* to repeal a patent, prosecuted in the name of the king <sup>i</sup>. And it has been adjudged, that no costs are payable by the plaintiff, on moving to quash his own writ before plea <sup>k</sup>; or after a plea in abatement <sup>l</sup>.

The *execution* in *scire facias* is governed by the award of it: And though in the case of bail, the recognisance be to levy of the lands and chattels, yet execution of the body by *capias ad satisfaciendum* is good <sup>m</sup>, even as against bail in error <sup>n</sup>, by the course of the court. And a *capias ad satisfaciendum* may be taken out against bail, without any *feri facias*, or return of *nulla bona* <sup>o</sup>. If the principal be in execution, the plaintiff, it is said, cannot take the bail <sup>p</sup>: But if execution be taken against the bail, and they pay part, yet the plaintiff may afterwards take execution against the principal for the residue, the bail being previously set at liberty <sup>q</sup>; and this is said to be the constant practice of the court. Also, if two be bail, although one be in execution,

<sup>h</sup> 1 Str. 188. 3 East, 202. 25, &c.

<sup>i</sup> 7 T. R. 367.

<sup>n</sup> 2 Str. 822. Append. Chap.

<sup>k</sup> Cas. Pr. C. P. 74. 109. Pr. XLII. § 28.

Reg. 78. 378. Barnes, 431.

<sup>o</sup> 2 Str. 1139.

but see 1 Str. 638.

<sup>p</sup> Cro. Jac. 320.

<sup>l</sup> 1 Str. 638.

<sup>q</sup> 1 Sid. 107. and see Cro.

<sup>m</sup> 1 Rol. Abr. 897. 1 Lev. Jac. 549.

226. Append. Chap. XLII. §

ecution, yet the plaintiff may take the other<sup>r</sup>. And the recognisance being joint and several, the execution may be several, though the *scire facias* was joint<sup>s</sup>.

<sup>r</sup> Cro. Jac. 320.

S. C. Bac. Abr. tit. *Execu-*

<sup>s</sup> 1 Lev. 225. 1 Sid. 339. *tion*, G.

## CHAPTER XLIII.

*Of Error.*

A WRIT of *error* is an *original* writ, issuing out of Chancery, and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit, in a court of record <sup>a</sup>; and is in nature of a commission to the judges of the same or a superior court, by which they are authorised to examine the record, upon which judgment was given, and on such examination to affirm or reverse the same, according to law <sup>b</sup>. This writ is grantable *ex debito justitiæ*, in all cases, except in treason and felony <sup>c</sup>. And it is said, that wherever a new jurisdiction is erected by act of parliament, and the court or judge that exercise this jurisdiction, act as a court or judge of record, according to the course of the common law, a writ of error lies on their judgments; but where they act in a summary way, or in a new course different from the common law, there a writ of error lies not, but a *certiorari* <sup>d</sup>. To amend errors in  
a court

<sup>a</sup> Co. Lit. 288. b.<sup>c</sup> 2 Salk. 504.<sup>b</sup> 2 Bac. Abr. 187. 1 Str. <sup>d</sup> 1 Salk. 144. 263. and see 607. 2 Ld. Raym. 1403. S. C. 3 Salk. 148.

Cas. temp. Hardw. 346.



a court not of record, a writ of *false-judgment* is the proper remedy <sup>e</sup>.

The writ of error is usually brought by the party or parties against whom the judgment was given; or it may be brought by a plaintiff to reverse his own judgment, if erroneous, in order to enable him to bring another action <sup>f</sup>. But the defendant is not allowed to bring it, contrary to his own agreement, or that of his attorney <sup>g</sup>: And where executors, against whom a *scire facias* had been sued out, to recover damages assessed on an interlocutory judgment against their testator, brought a writ of error, after the testator's attorney had agreed for him that no writ of error should be brought, the court on motion ordered the attorney to *nonpros* the writ of error; for the *scire facias* was merely a continuation of the proceedings in the original action; and as the testator himself, if he had lived, could not have brought a writ of error, in consequence of the agreement, so neither could his executors <sup>h</sup>.

If an action be brought against a *feme-covert*, as a *feme-sole*, and she plead to issue as a *feme-sole*, and judgment be given against her, upon which she is taken in execution, she and her husband may join

<sup>e</sup> Co Lit. 288. b. Finch, L.

<sup>g</sup> 2 T. R. 183.

484. 3 Blac. Com. 406.

<sup>h</sup> 1 T. R. 388, *Ante*, 983, 4.

<sup>f</sup> 3 Bur. 1772.

join in bringing a writ of error; for otherwise the husband might be prejudiced by losing the society of his wife, and her care in his domestic concerns, and he hath no other means to help himself<sup>i</sup>: So if an action be brought against a *feme-covert* and others, they may all join with the husband in bringing a writ of error<sup>k</sup>.

It is a general rule, that no person can bring a writ of error to reverse a judgment, who was not party or privy to the record, or prejudiced by the judgment, and therefore to receive advantage by the reversal of it<sup>l</sup>. Hence it has been determined, that if there be judgment, against the *principal*, and also against the *bail*, the principal cannot have error on the judgment against the bail<sup>m</sup>, nor the bail on the judgment against the principal<sup>n</sup>, nor can they join in a writ of error<sup>o</sup>; for these are distinct judgments, and affect different persons.

On a judgment against *several* parties, the writ of error must be brought in all their names<sup>p</sup>, provided they are all living, and aggrieved by the judgment;  
for

<sup>i</sup> 1 Rol. Abr. 748. Sty. Rep. 408. 481. 561. 1 Ld. Raym. 254. 280. 328. Carth. 447. S. C.

<sup>k</sup> 1 Rol. Abr. 748. <sup>o</sup> Palm. 567. Cro. Car. 300.

<sup>l</sup> 2 Bac. Abr. 195. 408. 574, 5.

<sup>m</sup> *Id.* 199. 1 Rol. Abr. 748, <sup>p</sup> 6 Co. 25. Cro. Eliz. 648, 9. Cro. Car. 408. and see Lil. 9. S. C. Yelv. 4. Cro. Eliz. Ent. 378. and the cases there 892. S. C. Carth. 7, 8. 3 cited. Mod. 134. S. C. 1 Ld. Raym.

<sup>n</sup> 2 Leon. 101. Cro. Car. 71. 151. 5 Mod. 1669

for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from his execution for a long time, and from having any benefit of his judgment, though it might be affirmed once or oftener<sup>q</sup>: And if the writ of error, in such case, be brought by one or more of the defendants only, it may be quashed<sup>p</sup>. But where judgment is given against several parties, and one or more of them die, the writ of error may be brought by the survivors<sup>r</sup>. And in *trespass* against three, if there be judgment by default against two of them, and the third plead to issue, and it be found for him, the two only may bring a writ of error; for the party in whose favour the judgment was given, cannot say that it was to his prejudice<sup>s</sup>. So if a writ of error be brought in the names of several parties, and any one or more of them refuse to appear and assign errors, they must be *summoned* and *severed*; after which the writ of error may be proceeded

Carth. 367. Comb. 354. Holt, 54. S. C. 1 Ld. Raym. 244. Carth. 404. Comb. 441. 1 Salk. 319. 5 Mod. 338. S. C. 1 Ld. Raym. 328. 2 Ld. Raym. 870. 1 Salk. 313. S. C. 6 Mod. 40. 1 Str. 234. 2 Ld. Raym. 1403. 1 Str. 606. 8 Mod. 305. 316. S. C. 2 Ld. Raym. 1532. Cas. *templ.*

Hardw. 135, 6. 1 Wils. 88. 3 Bur. 1792. 2 T. R. 737.

<sup>q</sup> Carth. 8. and see 3 Bur. 1789.

<sup>r</sup> Palm. 151. 1 Str. 234.

<sup>s</sup> 1 Lev. 210. Hob. 70. 1 Str. 683. 2 Str. 892. 1110. Cowp. 425. 2 Blac. Rep. 1067. but see Sty. Rep. 190. 3 Salk. 146. *semb. contra.*

ceeded in by the rest alone <sup>t</sup>: And where a writ of error was brought in the names of two executors, and one would not join in assigning errors, the court gave the other time to assign them, till there could be summons and severance <sup>u</sup>.

On a writ of error brought against two executors, one only appeared, and sued out a *scire facias quare executionem non*, upon which the judgment was affirmed for both executors; and upon a second writ of error, the court held, that a *scire facias quare executionem non* is only to bring in the plaintiff in error to assign his errors; and as he came in upon it, and assigned his errors, he waived any objection, and admitted the one executor to be sufficient to call upon him to assign them; and the court are not to presume that the other executor is alive: And though a writ of error by one alone, upon a judgment against two, be not good, yet that is upon account of the inconvenience that would arise, from a perpetual delay of execution, if every defendant might bring a writ of error by himself; but that reason does not hold in this case, where the executors are defendants in error, and not plaintiffs <sup>v</sup>.

A writ

<sup>t</sup> Yelv. 4. Cro. Eliz. 892. Hardw. 135, 6.

S. C. Cro. Jac. 117. Carth. 7, <sup>u</sup> 2 Str. 783.

3. 3 Mod. 134. S. C. 6 Mod. <sup>v</sup> 3 Bur. 1789.

40. 1 Str. 234. Cas. temp.

A writ of error lies for some error or defect in substance, that is not aided, amendable, or cured at common law, or by some of the statutes of amendments or jeofails <sup>w</sup>. And it lies to the *same* court in which the judgment was given, or to which the record is removed by writ of error, or to a *superior* court. If a judgment in the King's-Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the *same* court, by writ of error *coram nobis*, or *quæ coram nobis resident* <sup>x</sup>, so called from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself <sup>y</sup>; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman, at the time of commencing the suit, or died before verdict, or interlocutory judgment: for error in fact is not the error of the judges, and reversing it is not reversing their own judgment <sup>z</sup>. So upon a judgment in the King's-Bench, if there be error in the *process*, or through the default of the *clerks*, it may be reversed in the same court, by writ of error

<sup>w</sup> *Ante*, 826, &c.

<sup>x</sup> Append. Chap. XLIII. § 2, 3.

<sup>y</sup> In the Common-Pleas, the record and process being stated to remain before the king's justices, the writ of er-

ror is called a writ of error *coram vobis*, or *quæ coram vobis resident*.

<sup>z</sup> 1 Rol. Abr. 747. Cro. Eliz. 105, 6. 1 Sid. 208. 3 Salk. 145, 6, 7.



ror *coram nobis*<sup>a</sup>: But if an erroneous judgment be given in the King's-Bench, and the error lie in the judgment itself, and not in the process, a writ of error does not lie in the same court upon such judgment<sup>b</sup>.

If a writ of error returnable in the King's-Bench *abate*, after removal of the record, by death or otherwise<sup>c</sup>, or be *quashed* for any other fault than variance<sup>d</sup>, error *coram nobis* lies in the same court to which the record is removed: But formerly, if there had been a *variance* between the record and the writ of error, the record not being removed, there must have been a new writ<sup>e</sup>. And error *coram nobis* lies not in the King's-Bench, after an *affirmance* in that court<sup>f</sup>, or in the Exchequer-chamber<sup>g</sup>. Neither does it lie, for error in *fact*, in the Exchequer-chamber<sup>h</sup>, or House of Lords; for the record is not removed thither, but only a transcript: and it is said to be beneath the dignity of the House of Lords, that being the supreme judicature, to examine matters of fact<sup>i</sup>.

For

<sup>a</sup> 1 Rol. Abr. 746. F. N. B. 8 Mod. 305. 316. S. C.

21. Poph. 181.

<sup>e</sup> Godb. 375. but see the

<sup>b</sup> 1 Rol. Abr. 746.

stat. 5 Geo. I. c. 13.

<sup>c</sup> *Id.* 753. Yelv. 6. Cro.

<sup>f</sup> 2 Str. 949. 975. 1 Salk.

Eliz. 891. S. C. Godb. 375.

337. *Semb. contra.*

Latch, 198. S. C. Cro. Car.

<sup>g</sup> 1 Str. 690.

575.

<sup>h</sup> 1 Rol. Abr. 755. Com.

<sup>d</sup> 1 Ld. Raym. 151. Carth.

Rep. 597.

367. 5 Mod. 16. 69. S. C. 1

<sup>i</sup> 3 Salk. 145, 6.

Str. 606. 2 Ld. Raym. 1403.

For the error or mistake of the judges, in point of *law*, a writ of error lies to the King's-Bench, from the Common-Pleas at *Westminster*<sup>k</sup>, and from all inferior courts of record in *England*<sup>l</sup>, except in *London*<sup>m</sup>, and some other places; and after judgment given thereon, a second writ of error may be brought, returnable in the House of Lords: but error lies not from an inferior court, to the Common-Pleas<sup>n</sup>.

In *London*, a writ of error lies from the sheriff's courts, to the court of hustings of common pleas; and from the court of hustings, whether of common pleas or pleas of land, and also from the law side of the mayor's court, to a court of appeal held before commissioners appointed under the great seal, and from thence immediately to the House of Lords<sup>o</sup>. It also seems, that the appeal against decrees made on the equity side of the mayor's court, is immediately to the House of Lords<sup>p</sup>.

On a judgment given in the *Cinque-ports*, no writ of error lies in the King's-Bench or Common-Pleas; but by custom, such judgment is examinable by bill, in nature of a writ of error, before the

<sup>k</sup> 4 Inst. 22.

<sup>l</sup> Append. Chap. XLIII. § 7.

<sup>m</sup> 2 Bur. 777.

<sup>n</sup> Finch, L. 480. Cro. Eliz.  
26. 3 Blac. Com. 411.

<sup>o</sup> *Emerson*, on the City  
Courts, 27. 76. 97. 2 Bac.  
Abr. 215.

<sup>p</sup> *Emerson*, on the City  
Courts, 86.

the lord-keeper or warden of the *Cinque-ports*, at his court of *Shepway*<sup>q</sup>. So if a judgment be given in the court of *Stannaries*, in the duchy of *Cornwall*, for any matters touching the stannaries<sup>r</sup>, no writ of error lies upon this, in the King's-Bench or Common-Pleas; but an appeal to the warden of the *Stannaries*, and from him to the Prince of *Wales*, and when there is no prince, to the king in council<sup>s</sup>.

A writ of error lies at common law in the King's-Bench, upon a judgment in a *county palatine*; for though these are superior courts, and have *jura regalia*, yet their jurisdiction is derived from the crown<sup>t</sup>. And by the 34 & 35 *Hen. VIII. c. 26. § 113.* and 1 *W. & M. c. 27.* errors in judgments, in pleas real mixed and personal, before the justices in their great-sessions in *Wales*, shall be redressed by writ of error, in the King's-Bench in *England*.

At common law, no writ of error lay on a judgment from the King's-Bench, except in parliament; by which means the subject was often disappointed of his writ of error, either by the not sitting of parliament, or by their being employed in public business, when they did sit<sup>u</sup>. To remedy this, it was enacted, by the statute 27 *Eliz. c. 8.* that

“ where

<sup>q</sup> 4 *Inst.* 224.

<sup>r</sup> 3 *Bulst.* 183.

<sup>s</sup> 1 *Rol. Abr.* 745.

<sup>t</sup> *Id. ibid.* 4 *Inst.* 214. 218.

223.

<sup>u</sup> 2 *Bac. Abr.* 212.

“ where any judgment shall be given in the King’s-  
“ Bench, in any action of debt, detinue, cove-  
“ nant, account, action upon the case, ejećtment,  
“ or trespass, *first commenced there*, other than such  
“ only where the Queen shall be party, the plain-  
“ tiff or defendant, against whom such judgment  
“ shall be given, may at his *election* <sup>v</sup> sue out of the  
“ court of Chancery, a special writ of error, di-  
“ rected to the chief-justice of the King’s-Bench,  
“ commanding him to cause the record, and all  
“ things concerning the judgment, to be brought  
“ before the justices of the Common-bench, and  
“ barons of the Exchequer, into the Exchequer-  
“ chamber, there to be examined by the said  
“ justices and barons; which said justices, and  
“ such barons as are of the degree of the coif, or  
“ six of them, shall have full power and authority  
“ to examine all such errors as shall be assigned in  
“ or upon any such judgment, and thereupon to  
“ reverse or affirm the same, as the law shall re-  
“ quire, other than for errors concerning the ju-  
“ risdiction of the court of King’s-Bench, or for  
“ want of form in any writ, return, plaint, bill,  
“ declaration, or other pleading, process, verdict,  
“ or proceeding whatsoever; and after the said  
“ judgment shall be affirmed or reversed, the said  
“ record, and all things concerning the same, shall  
“ be

“be brought back into the King’s-Bench, that  
 “further proceeding may be had thereupon, as  
 “well for execution as otherwise: But such re-  
 “versal or affirmation shall not be so final, but  
 “that the party grieved shall and may sue in the  
 “high court of Parliament, for the further and  
 “due examination of the said judgment, as was  
 “then usual upon erroneous judgments in the  
 “court of King’s-Bench.”

This statute is confined to the particular actions enumerated therein; and does not extend to actions of replevin<sup>w</sup>, rescous<sup>x</sup>, *scandalum magnatum*<sup>y</sup>, ravishment of ward<sup>z</sup>, or *scire facias* against bail<sup>a</sup>, &c.: In these actions therefore, error will not lie in the Exchequer-chamber, but must be brought in parliament. In *scire facias* on a judgment, against the party or his executors, it seems that error lies in the Exchequer-chamber, *tam in redditione judicii, quam in adjudicatione executionis*<sup>b</sup>; but not upon an award of execution only<sup>c</sup>. Errors in *fact*, being examinable in the King’s-Bench, cannot

<sup>w</sup> 2 Rol. Rep. 434.

<sup>x</sup> Moor, 626. Cro. Jac. 171.

<sup>y</sup> Cro. Car. 142. W. Jon.

194. Ley, 82. S. C. 1 Sid.

143. 1 Vent. 49. 2 Ld. Raym.

954.

<sup>z</sup> 2 Rol. Rep. 134.

<sup>a</sup> Yelv. 157. Cro. Jac. 171.

Cro. Car. 280. 300. W. Jon.

325. 1 Ld. Raym. 98. but see

Cro. Eliz. 750. *contra*.

<sup>b</sup> Cro. Car. 286. 464. Ld.

Raym. 98.

<sup>c</sup> 2 Str. 1102. Andr. 287.

S. C.



cannot legally be assigned in the Exchequer-chamber<sup>d</sup>: yet if a release of errors be pleaded in that court, they may try it, and award a *venire*, under the seal of the court of Exchequer<sup>e</sup>.

We have already seen, that a writ of error does not lie in the Exchequer-chamber, upon a judgment of the King's-Bench, in an action commenced there by *original writ*; because it is not first commenced in the King's-Bench, but is founded upon the original writ issuing out of Chancery<sup>f</sup>. And for a similar reason, a writ of error lies not in the Exchequer-chamber, upon a judgment affirmed on error in the King's-Bench, but must be brought in the House of Lords<sup>g</sup>. So where a judgment of the King's-Bench was affirmed in the Exchequer-chamber, upon which the plaintiff sued out a *scire facias* in the King's-Bench, and had an award of execution, and afterwards the defendant brought a writ of error in the Exchequer-chamber, *tam in redditione judicii, quam in adjudicatione executionis*, the court held that this writ of error did not lie, and was no *supersedeas* of execution<sup>h</sup>. Upon that part of the statute, which excepts actions where the Queen shall be party, it has been questioned, whether a writ of error lies in the Exchequer-chamber,

<sup>d</sup> 2 Lev. 38. 1 Vent. 207.  
2 Mod. 194. Com. Rep. 597.

<sup>e</sup> 2 Str. 821.

<sup>f</sup> *Ante*, 94.

<sup>g</sup> 2 Bulst. 162. and see 1  
Rol. Rep. 264.

<sup>h</sup> 1 Salk. 263. 1 Ld. Raym.  
97. 5 Mod. 228. S. C.

ber, upon a judgment in an action of debt *qui tam*, upon the statute of usury <sup>i</sup>.

From proceedings on the *law* side of the Exchequer in *England*, a writ of error lies into the court of Exchequer-chamber, before the lord-chancellor, lord-treasurer, and the judges of the court of King's-Bench and Common-Pleas; and from thence it lies to the House of Peers <sup>j</sup>: But against decrees on the *equity* side of the Exchequer, the appeal is to the House of Peers in the first instance.

Before the union with *Scotland*, a writ of error lay not in this country, upon any judgment in *Scotland*, because it was a distinct kingdom, and governed by distinct laws <sup>k</sup>; but it is since given by statute <sup>l</sup>, from the court of Exchequer in *Scotland*, returnable in parliament. A writ of error formerly lay from the King's-Bench in *Ireland*, to the King's-Bench in *England*, and from thence to the House of Lords; but now, by the statute 23 *Geo. III.* c. 28. § 2. “no writ of error or appeal shall be received or adjudged, or any other proceedings had, by or in any of his majesty's courts in this kingdom, in any action or suit at law or in equity, instituted in any of his majesty's courts  
“ in

<sup>i</sup> Doug. 350.

I. 3.

<sup>j</sup> 3 Blac. Com. 411. and  
see 2 Bac. Abr. tit. *Error*,

<sup>k</sup> Show. P. C. 33.

<sup>l</sup> 6 Ann. c. 26. § 12.

“ in the kingdom of *Ireland*; and all such writs, “ appeals, or proceedings shall be, and they are “ thereby declared null and void, to all intents and “ purposes.” Since the union with *Ireland* however, a writ of error lies from the superior courts in that country, to the House of Lords.

No writ of error can be brought but on a judgment, or an award in nature of a judgment; for the words of the writ are, *si judicium redditum sit*, &c.<sup>m</sup> And hence it was formerly holden, that a writ of error could not be brought *before* judgment given; and if tested before, it was no *supersedeas*<sup>n</sup>: But it seems to be now agreed, that a writ of error, bearing teste before judgment, is good, so as the judgment be given before the return of it; and this is the usual course for preventing execution<sup>o</sup>: Still however, if the writ of error be returnable before judgment, it may be quashed<sup>p</sup>.

After judgment, *twenty* years are allowed for bringing a writ of error: And by the statute 10 & 11 *W. III.* c. 14. “ no judgment in any real or “ personal action, shall be reversed or avoided, “ for any error or defect therein, unless the writ “ of error be brought, and prosecuted with effect, “ within twenty years after such judgment signed, “ or

<sup>m</sup> Co. Lit. 288. b.

308. S. C. 1 Str. 632. 1 T.

<sup>n</sup> 2 Bac. Abr. 199. 1 Rol. R. 279.

Abr. 749. Moor, 461.

<sup>p</sup> 2 Ld. Raym. 1179. 1531.

<sup>o</sup> March, 140. 1 Vent. 96. 2 Str. 834. 891.

255. 1 Mod. 112. 3 Keb.

“ or entered of record.” This statute has the usual exceptions, in favour of infants, *feme-coverts*, persons *non compos mentis*, imprisoned, or beyond the seas. And the court on motion would not quash a writ of error, though brought twenty-nine years after the judgment; for this would be to deprive the party of the benefit of replying the exceptions in the statute <sup>q</sup>.

A writ of error, like a *scire facias*, is considered as a new action; and therefore upon bringing it, the defendant in the original action may change his attorney, without obtaining a judge’s order for that purpose <sup>r</sup>. To obtain a writ of error, application must be made by the attorney to the cursitor of the county where the venue was laid in the original action; who will make out the writ, in ordinary cases, as a matter of course, upon a *præcipe* <sup>s</sup> or note of instructions, containing the names of the parties, the nature of the judgment, the court wherein it was given, and the time when the writ is intended to be returnable. In parliament, there must be a warrant for the writ of error from the crown, which is procured by the cursitor <sup>t</sup>; and where it is against the king, the *fiat* of the attorney-general must be obtained, upon a petition, setting forth the errors intended to be assigned, accompanied

<sup>q</sup> 2 Str. 837.

<sup>r</sup> 1. 4. 8.

<sup>r</sup> 7 T. R. 337.

<sup>s</sup> Imp. K. B. 705.

<sup>s</sup> Append. Chap. XLIII. §

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accompanied with a certificate from counsel, that they are real errors. This practice was anciently used<sup>u</sup>, as a mark of decency and respect; and though it appears to have been laid aside in the last century<sup>v</sup>, yet it has since been revived.

The writ of error runs in the king's name; and, except in a county palatine, should be directed to the chief-justice, or other officer who has the custody of the record; as, in the Common-Pleas, *to our right trusty and well-beloved Richard Pepper Lord Alvanley, our chief-justice of the Bench*<sup>w</sup>; in the King's-Bench, *to our right trusty and well-beloved Edward Lord Ellenborough, our chief-justice assigned to hold pleas in our court before us*<sup>x</sup>; or, if it be a writ of error *coram nobis*, *to our justices assigned to hold pleas before us*<sup>y</sup>: and the writ of error in parliament, is directed to the chief-justice of the King's-Bench, upon a judgment of that court<sup>z</sup>. In the county palatine of *Lancaster*, the writ of error is directed to the Chancellor or his deputy, commanding him that he give in charge to the justices at *Lancaster*, that they send to him in his chancery, the record, &c. and the writ which came to them thereupon, and that he transmit the record<sup>a</sup>.

To

<sup>u</sup> Sav. 131.

<sup>v</sup> 1 Salk. 264.

<sup>w</sup> L. P. E. 67, 8. 78, 9.

Lil. Ent. 222. 268.

<sup>x</sup> L. P. E. 167. Lil. Ent.

213.

<sup>y</sup> Lil. Ent. 220. 231, 2.

<sup>z</sup> *Id.* 254.

<sup>a</sup> 2 Crompt. 344.



To reverse a fine, levied in the Common-Pleas, the writ of error is directed to the Chirographer, for the transcript of the *note* of the fine, and *writs* of covenant<sup>b</sup>; or to the *custos brevium*, for the transcript of the *foot* of the fine<sup>c</sup>: And in inferior courts, the writ of error should be directed to the judges before whom the judgment was given<sup>d</sup>.

In point of *form*, the body of the writ of error, when returnable in the King's-Bench, on a judgment of the Common-Pleas, runs thus: "Because in the record and process, and also in the giving of judgment, in a plaint which was in our court, before you and your companions, our justices of the bench, by our writ, between A. B. and C. D. late of, &c. of a plea of, &c. (describing the nature of the action,) manifest error hath intervened, to the great damage of the said C. D. as from his complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you do distinctly and openly send to us, under your seal, the record and process aforesaid, with all things touching the same, and this writ, so that we may have them on, &c. (a general return-day) wheresoever we shall

<sup>b</sup> Lil. Ent. 280.

<sup>d</sup> Godb. 44.

<sup>c</sup> *Id.* 282.

shall then be in *England*, that the record and process aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of *England*, ought to be done<sup>e</sup>." This writ consists of two parts, first, a *certiorari* to remove the record; and secondly, a *commission* to examine it<sup>f</sup>: But in a writ of error *coram nobis*, the *certiorari* part being unnecessary is omitted, and the writ contains only a commission to examine errors<sup>g</sup>.

Where the writ of error is returnable in the Exchequer-chamber, it begins by reciting the statute 27 *Eliz.* c. 8. and brings the case within that statute, by stating that the error in no wise concerns the king, or the jurisdiction of the court of King's-Bench, or any want of form in any writ, &c.<sup>h</sup>. In the House of Lords, the writ of error differs in point of form, accordingly as it is brought on a judgment originally given in the court of King's-Bench<sup>i</sup>, or on a judgment affirmed there<sup>j</sup>, or in the Exchequer-chamber<sup>k</sup>. And where the error is supposed to be as well in giving the judgment, as in awarding execution thereon, the writ of error is

said

<sup>e</sup> Append. Chap. XLIII. § 5, &c.

<sup>f</sup> 1 Str. 607.

<sup>g</sup> Append. Chap. XLIII. § 2, 3.

<sup>h</sup> *Id.* § 9.

<sup>i</sup> *Id.* § 10.

<sup>j</sup> *Id.* § 11.

<sup>k</sup> *Id.* § 12.

said to be *tam quam*, or in the words of the writ, *tam in redditione judicii, quam in adjudicatione executionis*<sup>1</sup>.

The *teste* of the writ of error is the day of suing it out; and in the King's-Bench, it is returnable *ubicunque*, &c. on the first or last *general* return of the term<sup>m</sup>: In the Exchequer-chamber, it is returnable before the justices of the Common-bench, and barons of the Exchequer, of the degree of the coif, in the Exchequer-chamber, on a *particular* return-day<sup>n</sup>: In the House of Lords, when the parliament is sitting, the writ of error is made returnable before the king in his present parliament, *immédiatè*, or without delay; because that court, during the session of it, is supposed to sit continually, and has no vacation, and it is for the honour of that high tribunal to be immediately attended, that they may do the speedier justice<sup>o</sup>: After a prorogation, the writ of error is returnable before the king in his parliament, at the next *session*<sup>p</sup>; or after a dissolution, at the next *parliament*, specifying the day when it is to be holden<sup>q</sup>. And it is necessary, in all cases, that there should be fifteen days between the *teste* and return of a writ of error.

The

<sup>1</sup> 2 Str. 1055. Cas. temp. Hardw. 345. S. C.

<sup>m</sup> L. P. E. 33.

<sup>n</sup> Id. 167. Lil. Ent. 213.

<sup>o</sup> Lil. Ent. 248. 254.

<sup>p</sup> Id. 292.

<sup>q</sup> 1 Vent. 31. 266. 1 Mod.

106.

The writ of error being made out, is *sealed* in Chancery, either on a general seal-day, or, which is somewhat more expensive, at a private seal; and after being obtained from the cursitor, it should be taken to the clerk of the errors of the court in which the judgment was given <sup>r</sup>, who will *allow* the same, on being paid his fees, and make out a certificate or note of the allowance <sup>s</sup>; a copy of which should be served on the attorney for the defendant in error: this is usually done at the time of taxing costs, and at the same time, the original certificate should be shewn him. The writ of error *coram nobis* is allowed by the master<sup>r</sup> in open court <sup>t</sup>; and the rule of allowance <sup>u</sup> being drawn up by the clerk of the rules, a copy of it is served on the attorney for the defendant in error.

A writ of error, sued out *before* final judgment, continues in force during the whole term in which it is returnable <sup>v</sup>: and if final judgment be signed at any time during that term, it is a *supersedeas* or stay of execution, from the time of signing it <sup>w</sup>; provided bail, when requisite, be put in thereon, within four clear days after final judgment is signed.

<sup>r</sup> R. E. 36 Car. II. and see in *vacation* by the secondary.  
R. T. 20 Car. I. K. B. <sup>u</sup> Append. Chap. XLIII. §

<sup>s</sup> Append. Chap. XLIII. § 14.  
13.

<sup>v</sup> Barnes, 196, 7, 8.

<sup>t</sup> L. P. E. 77. but see 2 <sup>w</sup> 1 Str. 632. and see 2 Bos.  
Crompt. 394. where it is said, & Pul. 137.  
that this writ may be allowed

ed<sup>x</sup>. And the court have gone so far, that if a writ of error be sued out, and the plaintiff do not sign final judgment, till a subsequent term after the return of the writ, in order to avoid the effect of it, and then take out execution, the court will set it aside<sup>y</sup>.

After final judgment, and before execution executed, a writ of error is generally speaking a *supersedeas* of execution, from the time of its allowance<sup>z</sup>, provided bail be put in and perfected in due time<sup>a</sup>; and the allowance is notice of itself<sup>b</sup>: Or if the defendant, before the allowance, have notice of the writ of error being sued out, and delivered to the clerk of the errors, it is from the time of that notice a *supersedeas*<sup>c</sup>. And a writ of error is so absolutely a *supersedeas*, that after it is allowed, the plaintiff cannot take out a *capias ad satisfaciendum* against the principal, and get it returned *non est inventus*, in order to proceed against the bail<sup>d</sup>; nor, if

<sup>x</sup> 2 Str. 781. 1 T. R. 279. 4 T. R. 121.

<sup>y</sup> 1 T. R. 280.

<sup>z</sup> Vent. 31. 1 Salk. 321. Willes, 271. Barnes, 205. S. C. 1 Bur. 340. 1 Gos. & Pul. 478. 2 Bos. & Pul. 370. 2 East, 439.

<sup>a</sup> 2 Str. 781. 1 T. R. 279. *Ante*, 470, 1. and see R. E. 36 Car. II. K. B. M. 28 Car. II. C. P.

<sup>b</sup> 1 Salk. 321. 1 T. R. 280. but in order to bring the attorney into contempt, for proceeding after the allowance, he must have had actual notice. *Id. ibid.* 1 Bur. 340.

<sup>c</sup> 1 Salk. 321. 6 Mod. 130. 2 Ld. Raym. 1260. S. C. 1 T. R. 280. Say. Rep. 51.

<sup>d</sup> 2 Str. 867. Fitzgib. 175. 1 Barnard. K. B. 334. S. C. 2 Ld. Raym. 1567. S. C.



if the *capias ad satisfaciendum* be sued out before, can the plaintiff call for a return of it, after the allowance of a writ of error<sup>e</sup>, even though it has previously lain four days in the office<sup>f</sup>: But in such case, the *capias ad satisfaciendum* may be returned, so as to fix the bail, after the writ of error is determined<sup>g</sup>. If the defendant bring a writ of error, and the plaintiff, as he may, bring an action on the judgment, and recover, he cannot sue out execution on the second judgment, till the writ of error be determined<sup>h</sup>. But where it is apparent to the court, that a writ of error is brought against good faith<sup>i</sup>, or for the mere purpose of delay<sup>k</sup>, or it is returnable of a term previous to the signing of final judgment<sup>l</sup>, or bail when requisite is not put in and perfected in due time<sup>m</sup>, it is not a *supersedeas*.

An execution being an entire thing, cannot be superseded after it is once begun: Therefore if a writ of execution be executed, before a writ of error allowed or notice, it may be returned afterwards; and the utmost length of time the law allows for executing a writ, is the day whereon it is returnable, and it is not executable any longer  
that

<sup>e</sup> 2 Str. 1186. 1 Wils. 16. *semb. contra.*

S. C. 1 East, 662.

<sup>i</sup> 2 T. R. 183.

<sup>f</sup> 3 T. R. 390.

<sup>k</sup> 4 T. R. 436. 5 T. R. 714.

<sup>g</sup> 1 Wils. 269. But see *Ante*, 471.

Barnes, 83, *contra*.

<sup>l</sup> Barnes, 197, 8.

<sup>h</sup> 3 T. R. 643. 4 Bur. 2454.

<sup>m</sup> 2 T. R. 44.

S. P. but see Barnes, 202, 3.

that day than the court sits: So long as it is executable, but not executed, the allowance of a writ of error is a *supersedeas*, but not afterwards<sup>n</sup>. Judgment in a cause was signed on the 30th of *April*, and the plaintiff on that day sued out a writ of *fiери facias*; afterwards a writ of error was allowed, and served on the agent in town on the 3d of *May*, and on the plaintiff's attorney in the country and under-sheriff on the 5th of *May*; the sheriff entered on the same day, but after notice of the allowance of the writ of error: No bail in error was put in; and the court upon that ground held, that the writ of error became an absolute nullity, and was no *supersedeas* or stay of execution: But they said, that if the writ of error had been followed up immediately, by the plaintiff in error regularly putting in bail, it would have operated as a *supersedeas*. The party therefore taking out execution, after the allowance of a writ of error, and before bail put in, does it at his peril; for if the writ of error be regularly followed up by bail, the execution will be set aside °.



I shall next proceed to inquire, in what cases *bail* is requisite on a writ of error, and when, where,  
and

<sup>n</sup> 1 Salk. 321. and see  
1 Vent. 255. Willes, 271.

Barnes, 205, S. C.

<sup>o</sup> 2 T. R. 45.

and how it should be put in, excepted to, and justified. No bail in error was required at common law; so that the defendant, by bringing a writ of error, might have delayed the plaintiff of his execution, without giving any security, either for the prosecution of such writ, or for the payment of the debt or damages recovered by the former judgment, in case it should be affirmed, or the writ of error should be discontinued, or the plaintiff in error nonsuited therein. The inconvenience of this was very early felt; and in order to guard against it, the court of King's-Bench, so long ago as in the reign of *Henry* the seventh<sup>p</sup>, would not allow a writ of error in parliament, until some error was shewn to them in the record, lest it should be brought on purpose to delay execution: And, with a like view, it was ordered by the justices of the Common-Pleas, in the reign of Queen *Elizabeth*, that the clerk of the treasury for the time being should not make a *supersedeas* upon any writ of error, to reverse or affirm any judgment given in that court, upon any verdict, demurrer in law or confession, until some manifest or pregnant error therein should be notified by the party that sued the writ of error, or some of his counsel, unto the justices

<sup>p</sup> 1 Hen. VII. 19. 1 Vent. 266.

justices of the bench, or to one of them at the least<sup>q</sup>.

And still further to avoid unnecessary delays of executions, it is enacted by the statute 3 *Jac.* I. c. 8. (made perpetual by the 3 *Car.* I. c. 4. § 4.) “that no execution shall be stayed or delayed, “upon or by any writ of error, or *supersedeas* “thereupon to be sued, for the reversing of any “judgment in any action or bill of debt, upon any “*single-bond* for debt, or upon any obligation with “condition for the *payment of money only*, or upon “any action or bill of debt for *rent*, or upon any “*contract*, sued in any of the courts of record at “*Westminster*, or in the counties palatine of *Ches-* “*ter*, *Lancaster* or *Durham*, or the courts of great “sessions in *Wales*; nor (by the 19 *Geo.* III. c. “70.) for the reversing of any judgment given in any “*inferior* court of record, where the *damages*<sup>r</sup> are “under ten pounds; unless the person or persons, “in whose name or names such writ of error shall “be brought, with two sufficient sureties, such as  
“the

<sup>q</sup> R. E. 23 Eliz. and see R. often prevails, of bringing writs of error for the mere purpose of delay.

were still acted under, and some such rule were made in the King's-Bench, or if the defendant upon suing out a writ of error, were obliged to bring the debt and costs into court, it might have a tendency to prevent the practice, that too  
<sup>r</sup> *Qu.* as to the *damages* here referred to; whether they are the damages laid in the declaration, or the damages recovered; and if the latter, whether they are with or without costs?

“ the court wherein the judgment is given shall allow of, shall first be bound unto the party for whom the judgment is given, by recognisance to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment be affirmed, or the writ of error non-prossed, all and singular the debts damages and costs adjudged upon the former judgment, and all costs and damages, to be awarded for the laying of execution.”

This statute is confined to the particular actions enumerated therein; and does not extend to actions on the case upon bills of exchange<sup>s</sup>, &c. but it extends, in the actions specified, to all manner of judgments, by default, upon demurrer, or *nul tiel record*, as well as after verdict. In actions of *debt* on bond, conditioned for the payment of *money only*, the statute has been construed to extend, not only to cases where the sum was originally certain, and payable absolutely by the condition, without referring to any other instrument; but also to cases, where the sum was originally uncertain, but afterwards reduced to a certainty; as *debt* on bond conditioned for the payment of so much money as

J. S.

<sup>s</sup> 2 Keb. 234.



J. S. should declare to be due on an account<sup>t</sup>; or on a bottomree bond, by which the money was payable upon a contingency, which has happened<sup>u</sup>; or where the bond was conditioned for the payment of a sum of money mentioned in certain indentures<sup>v</sup>, &c.

But the statute does not extend to actions of *debt* on bond, conditioned for the performance of *covenants*<sup>w</sup>, or of an *award*, &c. even though one of the covenants be for the payment of money, and the action be brought for the non-performance of that covenant<sup>x</sup>. But in an action of *debt* on bond conditioned for the performance of covenants, if the defendant let judgment go by default, without cravingoyer of the condition, and after bring a writ of error, it is said that in the King's-Bench, he must put in bail thereon; because it does not appear to the court upon the record, that the condition was for performance of covenants<sup>y</sup>. In *debt* on a general bond of indemnity, bail is not required, on bringing a writ of error after judgment by default: But where a man having entered into a bond,

<sup>t</sup> 1 Lev. 117. 1 Keb. 613. Barnes, 78. 98.

S. C.

<sup>w</sup> 1 Bulst. 54.

<sup>u</sup> 1 Str. 476. and see 6 Mod.

<sup>x</sup> Carth. 28. 1 Show. 14. S.

38. but see 1 Show. 14. Comb.

C. 2 Keb. 131. S. P.

105. S. C. 7 T. R. 450.

<sup>y</sup> 2 Cromp. 363. but see

<sup>v</sup> 2 Str. 959. 2 Barnard. K.

Barnes, 72. C. P. *semb. contra*.

B. 389. Kelynge, 181. S. C.

bond, as surety for another, to pay a sum of money to a third person, took a counter-bond for payment of the money, by way of indemnity, the court held this to be a case within the statute, and consequently that bail in error was necessary <sup>z</sup>.

The condition of a bond was, to pay for so much beer as the obligee should deliver to J. S. not exceeding 100*l.*; and after judgment upon demurrer, the court held that no bail was requisite <sup>a</sup>. But in a subsequent case <sup>b</sup>, where a bond was given by a third person, as collateral security for a debtor's paying his creditors fifteen shillings in the pound, upon the liquidated amount of his debts, the court held this to be a bond with condition for the payment of money only; and that its being payable by instalments made no difference. In the former case, the court seem to have considered the statute as introductive of a new law, in restraint of the remedy by writ of error, and therefore that it should be construed strictly, and not extended by equity to cases out of the letter of it: But in the latter case, they appear to have holden, that the statute was of a remedial nature, and ought to receive a liberal construction, for the benefit of the party, whose execution would otherwise be stayed by the writ of error,

<sup>z</sup> Com. Rep. 321, 2. 10 S. C.  
 Mod. 281. *contra*. <sup>b</sup> 2 Bur. 746.  
<sup>a</sup> 2 Str. 1190. 1 Wils. 19.

error, and particularly as writs of error are frequently brought for the mere purpose of delay.

In actions upon *contracts*, the statute is confined to cases, where there was originally a specific contract for a sum certain; and it does not extend to actions of *debt* on a promissory note<sup>c</sup>, or on the common counts for work and labour, and goods sold and delivered<sup>d</sup>, &c. or upon an account-stated<sup>e</sup>; nor to an action of *debt* upon an award, when the arbitrators have directed several controversies to be settled by the payment of one sum<sup>e</sup>. Neither, for a similar reason, is bail in error required in an action of *debt* on judgment<sup>f</sup>; nor, as it should seem, in an action of *debt* upon a recognisance of bail<sup>g</sup>. And it seems, that if there be one count in the declaration, on which judgment is entered, on a cause of action for which *debt* would not lie at the time of the statute of James, no bail in error is required<sup>h</sup>. But if judgment be affirmed, on a writ of error, in the King's-Bench<sup>i</sup>, or Exchequer-chamber<sup>k</sup>, new bail must be given, on bringing a writ of error in parliament; for the first recognisance

does

<sup>c</sup> 2 East, 359.

506. S. C.

<sup>d</sup> 1 Bos. & Pul. 249.

<sup>g</sup> 3 Bur. 1566. Barnes, 194.

<sup>e</sup> Yelv. 227. 2 Bulst. 53. S.

but see 2 Blac. Rep. 1227.

C. 1 Lev. 117. 1 Show. 15.

<sup>h</sup> 2 East, 359.

S. C. cited. 3 Salk. 147. 7 T.

<sup>i</sup> 1 Salk. 97. 2 Ld. Raym.

R. 449. 2 East, 359.

840. 7 Mod. 120. S. C.

<sup>f</sup> 3 Bur. 1548. 1 Blac. Rep.

<sup>k</sup> 1 Str. 527.

does not include the costs to be assessed in the House of Lords, and therefore a new recognisance must be given, within the intent of the statute; and it is not the business of the court where the judgment is affirmed, to examine whether bail was put in upon the first writ, for the want of that does not hinder the prosecution of the writ of error, but only makes it no *supersedeas*<sup>1</sup>.

The before-mentioned statute was extended to other actions, by the 13 *Car. II.* stat. 2. c. 2. § 9. by which it is enacted, “that no execution shall be  
“ stayed, in any of the courts mentioned in the sta-  
“ tute 3 *Jac. I.*, by any writ or writs of error, or *su-*  
“ *persedeas* thereupon, *after verdict* and judgment,  
“ in any action of debt grounded upon the statute  
“ 2 & 3 *Edw. VI.* c. 3. for not setting forth tythes,  
“ nor in any action upon the case, upon any pro-  
“ mise for payment of money, actions *sur trover*,  
“ actions of covenant, detinue, and trespass, unless  
“ such recognisance, and in such manner, as by the  
“ former act is directed, shall be first acknow-  
“ ledged in the court where the judgment is given.”

And by the 16 & 17 *Car. II.* c. 8. § 3. (made perpetual by the 22 & 23 *Car. II.* c. 4.) “no exe-  
“ cution shall be stayed, in any of the lastmen-  
“ tioned courts, by writ of error or *supersedeas*  
“ thereupon, *after verdict* and judgment, *in any ac-*  
“ *tion personal whatsoever*, unless a recognisance,  
“ with

<sup>1</sup> 1 Salk. 97.

“ with condition according to the statute 3 *Jac.* I.  
 “ shall be first acknowledged, in the court where  
 “ such judgment shall be given. And further, that  
 “ in writs of error to be brought upon any judg-  
 “ ment after verdict, in any writ of *dower*, or in any  
 “ action of *ejectione firmæ*, no execution shall be  
 “ stayed, unless the plaintiff or plaintiffs in such  
 “ writ of error shall be bound unto the plaintiff in  
 “ such writ of *dower*, or action of *ejectione firmæ*,  
 “ in such reasonable sum as the court to which  
 “ such writ of error shall be directed shall think fit,  
 “ with condition, that if the judgment shall be af-  
 “ firmed, or the writ of error discontinued, in de-  
 “ fault of the plaintiff or plaintiffs therein, or the  
 “ said plaintiff or plaintiffs be nonsuited in such  
 “ writs of error, that then the said plaintiff or plain-  
 “ tiffs shall pay such costs, damages, and sum and  
 “ sums of money, as shall be awarded upon or af-  
 “ ter such judgment affirmed, discontinuance, or  
 “ nonsuit.”

And to the end that the same sum and sums and  
 damages may be ascertained, it is further enacted,  
 that “ the court wherein such execution ought to  
 “ be granted, upon such affirmation, discontinu-  
 “ ance or nonsuit, shall issue a writ to inquire as  
 “ well of the mesne-profits, as of the damages by  
 “ any waste committed, after the first judgment in  
 “ *dower*, or in *ejectione firmæ*; and upon the return  
 “ thereof, judgment shall be given and execution  
 “ awarded,



“ awarded, for such mesne-profits and damages,  
 “ and also for costs of suit <sup>m</sup>. ”

The two last-mentioned statutes are confined to judgments after verdict; and do not extend, like the former, to judgments by default, upon demurrer or *nul tiel record*: Therefore upon these latter judgments, a writ of error is a *supersedeas* without bail, in such actions as are not enumerated in 3 *Jac.* I. But it has been determined, that a *scire facias* against bail is a *personal* action, within the 16 & 17 *Car.* II. c. 8 <sup>n</sup>. In this latter statute there is a *proviso*, “ that it shall not extend to any writ of error, to be brought by any *executor* or *administrator*; nor unto any action popular, or other action brought upon any penal law or statute, except actions of debt for not setting forth tythes; nor to any indictment, presentment, inquisition, information, or appeal.” It has however been determined, that if judgment be given against an executor or administrator *de bonis propriis*, he shall put in bail, in cases where it would be required of other persons <sup>o</sup>: and though an executor or administrator be not compellable to give bail in error, yet if he do, the court may take it, and the recognisance will be binding <sup>p</sup>.

The

<sup>m</sup> § 4. and see 2 H. Blac. 2 Keb. 295. 371. S. C.  
 286, 7.

<sup>p</sup> 2 Str. 745. 2 Ld. Raym.

<sup>n</sup> 2 Blac. Rep. 1227.

1459. S. C.

<sup>o</sup> 1 Lev. 245. 1 Sid. 368.

The statutes requiring bail in error do not extend to the writ of error *coram nobis*<sup>q</sup>; which is or is not a *supersedeas* of execution, according to circumstances. Where a writ of error *abates* by the act of God, as by the death of the parties<sup>r</sup>, or chief-justice<sup>s</sup>, or by the act of law, a second writ of error is a *supersedeas* of itself, without motion or leave of the court. And it is said, that if a writ of error be brought in the same court, after abatement or discontinuance of a writ of error *coram nobis*, no bail is requisite, because none was required on the former writ of error<sup>t</sup>. But this must be understood, where the writ of error *coram nobis* is brought after an abatement by the act of God, or of the law; for where a writ of error is quashed in the King's-Bench for insufficiency, a writ of error *coram nobis* is not a *supersedeas* of itself<sup>u</sup>. In such case however, the court on motion will order, that upon the plaintiff in error putting in and justifying bail within four days, further proceedings shall be stayed on the judgment in the original action, until the writ of error be determined<sup>v</sup>; which is also the course, upon a writ of error *coram nobis* for error in fact. And a like order was made, where a second writ of error was quashed for insufficiency;

for

<sup>q</sup> 2 Crompt. 394.

<sup>t</sup> 2 Crompt. 396.

<sup>r</sup> Latch, 57, 8. 1 Vent. 353.

<sup>u</sup> Carth. 368, 9. 1 Ld. Raym.

<sup>s</sup> 1 Keb. 658. 686. but see Barnes, 201. Prac. Reg. 195. S. C.

151. S. C. 2 Ld. Raym. 1404. 1 Str. 607. S. C. and see 2 Str. 949.

for such second writ being void, was as if there had been none before<sup>v</sup>. Where a writ of error abates by the act or default of the party, a second writ of error is no *supersedeas*<sup>w</sup>; as where the plaintiff in error marries<sup>x</sup>, or the writ of error is nonprossed<sup>y</sup>. In these cases, the court on motion will give the defendant in error leave to take out execution, notwithstanding a second writ of error: And it seems, that on a writ of error *coram nobis*, execution taken out without leave of the court is irregular<sup>z</sup>.

Where bail is required upon a writ of error, it should be put in within *four* days after the delivery of the writ to the clerk of the errors, if it be sued out after final judgment<sup>a</sup>; or if it be sued out before, the bail should be put in within four days after final judgment is signed<sup>b</sup>; otherwise the party succeeding in the original action may take out execution, notwithstanding the writ of error<sup>c</sup>: And in  
the

<sup>v</sup> Carth. 370.

<sup>w</sup> Latch, 57, 8. 1 Vent. 353.

<sup>x</sup> 2 Str. 880. 1015.

<sup>y</sup> 1 Crompt. 350.

<sup>z</sup> Say. Rep. 166. Barnes, 201.

<sup>2</sup> Blac. Rep. 1067. *Ante*, 909.

<sup>a</sup> R. E. 36 Car. II. K. B.

R. T. & M. 28 Car. II. 1 Bos. & Pul. 478. C. P. By a former rule of E. 16 Car. II. the plaintiff in error in the King's-

Bench had four days to put in bail, after the *allowance* of the writ of error. And see R. T. 26 & 27 Geo. II. for the time and manner of putting in and perfecting bail in error, in the Exchequer of Pleas.

<sup>b</sup> 2 Str. 781. 1 T. R. 279. 4

T. R. 121. 1 Bos. & Pul. 478.

<sup>c</sup> 2 T. R. 44.

the Common-Pleas, there is no occasion for a certificate from the clerk of the errors, that no bail is put in<sup>d</sup>. The bail is put in with the clerk of the errors, who attends to take their acknowledgment, in the court wherein the judgment was given, or before a judge of that court; and it seems that they cannot be put in before a commissioner in the country<sup>e</sup>. The same persons who were bail in the original action, may become bail in error, if they are able to justify<sup>f</sup>.

In *personal* actions, it is a rule, founded upon the statute 3 *Jac.* I., that the recognisance should be acknowledged in double the sum adjudged to be recovered by the former judgment: But upon error in *debt* on bond, though the bail are to be bound in double the penalty recovered, yet by the course of the court of King's-Bench, it is sufficient if they justify in double what is really due<sup>g</sup>. In *ejectment*, the bail must justify in double the amount of the yearly rent, or value of the mesne-profits, and costs<sup>h</sup>. And the party bringing the writ

<sup>d</sup> Barnes, 212.

<sup>e</sup> *Id.* 78.

<sup>f</sup> 8 T. R. 639.

<sup>g</sup> 2 Str. 821. 1 Wils. 213.  
and see R. E. 33 Geo. II. in  
*Stac.* and 2 Bos. & Pul. 443.

C. P. where it was holden,  
that if the bail are bound in

double the sum secured by the  
condition, it is sufficient;  
though a further sum be due  
for interest, and costs and no-  
minal damages have been re-  
covered.

<sup>h</sup> *Cas. temp.* Hardw. 374. 4  
Bur. 2502. Barnes, 103.

writ of error must join in the recognisance<sup>i</sup>, except in *ejectment*, where it is sufficient if the recognisance be entered into by two sureties<sup>k</sup>.

The condition of the recognisance in the Common-Pleas, on a writ returnable in the King's-Bench, is, according to the direction of the statute, that the plaintiff shall prosecute his writ of error with effect; and, if judgment be affirmed, shall satisfy and pay the debt, damages and costs recovered, together with such costs and damages as shall be awarded by reason of the delay of execution, or else that they (the bail) shall do it for him<sup>l</sup>. On a writ of error returnable in the Exchequer-chamber, the form of the recognisance is somewhat different; the bail engaging to pay the sum recovered by the judgment, and such further costs of suit, sum and sums of money, as shall be awarded for delay of execution<sup>m</sup>. And as the engagement of the bail is absolute, it has been determined, that they cannot surrender the plaintiff in error<sup>n</sup>: nor are they entitled to relief, where he becomes bankrupt

<sup>i</sup> But see 2 Bos. & Pul. 443. where a recognisance entered into by the bail in error, without the principal, was holden good, on a judgment in *debt* in the common pleas.

<sup>k</sup> Carth. 121. Barnes, 75. 78.

<sup>l</sup> So on error *coram nobis*. Append. Chap. XLIII. § 18.

<sup>m</sup> *Id.* § 19. 2 T. R. 59.

<sup>n</sup> R. M. 5 W. & M. (b.) K. B.



rupt, whilst the writ of error is pending<sup>o</sup>: So if the bail become bankrupt, pending the writ of error, and before affirmance, they are not discharged from their recognisance; for till then the debt is contingent, and not proveable under the commission<sup>p</sup>.

When bail is put in, *notice* thereof should be given without delay to the defendant in error, or his attorney<sup>q</sup>; and if the defendant in error do not except to the bail for insufficiency, within twenty days next after such notice, the recognisance shall be allowed<sup>r</sup>. If the bail be not approved of, the defendant in error may, at any time within the twenty days, obtain a rule from the clerk of the errors, for better bail<sup>s</sup>; a copy of which should be served on the attorney for the plaintiff in error: And if the bail do not justify, or other bail be not put in and justified, within four days after notice of the rule, in *term-time*<sup>t</sup>, the party succeeding in the original action may take out execution<sup>u</sup>: But the

<sup>o</sup> 1 T. R. 624. and see 1 § 16.

Bos. & Pul. 440. where it was holden, that the bail in error are not discharged, by taking their principal in execution.

<sup>p</sup> 2 Str. 1043. Cas. *tempt.* Hardw. 262. S. C.

<sup>q</sup> Append. Chap. XLIII. § 15.

<sup>r</sup> R. M. 5 W. & M. K. B.

<sup>s</sup> Append. Chap. XLIII.

<sup>t</sup> In the King's-Bench, if a rule for better bail be served in *vacation*, there is no occasion to justify until the next term, though the practice is otherwise in the Common-Pleas. Barnes, 211. and see R. T. 26 & 27 Geo. II. in *Scac.*

<sup>u</sup> R. M. 5 W. & M. (b). K.

B. R. M. 6 Geo. 2. § 6. C. P.

the writ of error still remains, and may be proceeded in; the *supersedeas* to the execution only being taken away<sup>v</sup>. The mode of adding and justifying bail in error, is the same as in the original action<sup>w</sup>: And if a person excepted to as bail in error do not justify, his name may be struck out of the recognisance<sup>x</sup>.



Bail in error, when necessary, being complete, the next step to be taken by the plaintiff in error, except on a writ of error *coram nobis*, is to *certify* the record; in order to which a transcript should be made, and sent with the writ of error and return, into the court above. When no bail is required, this is the first step that is taken, after the service of the allowance of the writ of error. And the plaintiff in error should regularly cause the transcript to be made, (for the *defendant* cannot transcribe the record<sup>y</sup>;) by the time the writ of error is returnable. If the record be not certified by that time, the defendant in error may give the plaintiff a *rule* to certify it<sup>z</sup>; which is an eight-day rule, obtained from the clerk of the errors in the  
Common-

<sup>v</sup> 1 Salk. 97. 2 Ld. Raym. 840. 7 Mod. 120. S. C.

<sup>w</sup> For the form of notice of justification, see Append. Chap. XLIII. § 17.

<sup>x</sup> Say. Rep. 58. 1 Wils. 337. S. C.

<sup>y</sup> 1 Wils. 35.

<sup>z</sup> Cas. temp. Hardw. 352. Append. Chap. XLIII. § 20, 21.

Common-Pleas, on a writ of error from that court returnable in the King's-Bench, or from the clerk of the errors in the King's-Bench, on a writ of error returnable in the Exchequer-chamber or House of Lords; and when obtained, a copy of it should be forthwith made, and served on the attorney for the plaintiff in error<sup>a</sup>.

In the King's-Bench, on a writ of error to the Exchequer-chamber, if the writ be returnable the first return of the term, this rule may be had on the essoign-day<sup>b</sup>. In the House of Lords, there is an order, that upon writs of error, all persons shall bring in their writs, within fourteen days after the first day of the session in which such writs shall be returnable, otherwise they shall not be received, unless upon judgments given during the session, upon which the writs shall be brought in within fourteen days after judgment given<sup>c</sup>. And till the expiration of the time limited for bringing in the writ of error, the defendant in error cannot have execution<sup>d</sup>.

On a writ of error brought on a judgment in the Common-Pleas, or any inferior court, in an adverse suit, the record itself is supposed to be removed, that it may remain as a precedent and evidence

<sup>a</sup> L. P. E. 33.

<sup>b</sup> *Id. ibid.*

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<sup>c</sup> Com. Rep. 420, 21.

<sup>d</sup> *Id. ibid.* Bunb. 64. 69.

dence of the law in similar cases<sup>e</sup>. But in the case of a fine, the transcript only is removed from the Common-Pleas; for a fine is but a more solemn acknowledgment or contract of the parties, and is therefore no memorial of the law, and need only be affirmed or vacated: If it be affirmed, the contract stands as it was; if vacated, the justices of the King's-Bench may send for the fine itself, and reverse it; or they may send a writ to the treasurer and chamberlain, to take it off the file<sup>f</sup>. Besides, should the record itself be removed, and the fine affirmed, it could not be engrossed, for want of a Chirographer, in the King's-Bench<sup>g</sup>. This distinction however is not attended to in practice: for on all writs of error returnable in the King's-Bench<sup>h</sup>, as well as in the Exchequer-chamber<sup>i</sup>, or House of Lords<sup>k</sup>, it is usual to send only a transcript of the record, and not the record itself.

In an *inferior* court, on a writ of error returnable in the King's-Bench, the plaintiff in error, upon service of the rule to certify the record, should bespeak

<sup>e</sup> 2 Bac. Abr. 202. F. N. B. Harris. Prac. C. P. 434. 20. 1 Hen. VII. 20. 2 Salk. Salk. 565.  
565. <sup>i</sup> 2 Str. 837.

<sup>f</sup> 1 Salk. 337, 8. 341.

<sup>g</sup> 2 Bac. Abr. 203.

<sup>h</sup> R. M. 28 Car. II. C. P.

<sup>k</sup> 1 Hen. VII. 19, 20. Dyer,

375. Cro. Jac. 341, 2. 3 Bulst.

163, 4. S. C. T. Raym. 5.

speak the transcript of the proper officer below, and carry the same into the office of signer of the writs of the King's-Bench, (a part of whose business is to receive and deliver out writs of error and *certiorari*, &c.) and there file it, before the second seal; otherwise the defendant in error may apply, and get a certificate from the office, that the writ of error is not returned, and the transcript brought in; and may thereupon apply to the cursitor, for a writ *de executione judicii*, directed to the judges of the court below, commanding them that they proceed to execution on the judgment, notwithstanding the writ of error<sup>1</sup>.

In the King's-Bench and Common-Pleas, the transcript is made by the clerk of the errors, who acts as clerk to the chief-justice; and in order to enable him to make it, the defendant in error should leave with him the record, or copy of the proceedings; upon which he sends for the transcript-money, or a part of it, to the plaintiff in error; and if paid, he proceeds to make the transcript, which is examined with the record by the attorney for the defendant in error<sup>m</sup>. In the King's-Bench, on a writ of error to the Exchequer-chamber, if the writ be returnable on the first return-day of the term, the clerk of the errors takes the whole

<sup>1</sup> 2 Crompt. 345. 3 Salk. 146.      <sup>m</sup> L. P. E. 34. 5.



whole of that term to make the transcript; if on the last return-day, he takes all the vacation following<sup>n</sup>.

The transcript being made, examined and paid for, is delivered over, with the writ of error and return<sup>o</sup>, by the clerk of the errors of the Common-Pleas, to the signer of the writs in the King's-Bench; or by the clerk of the errors of the King's-Bench, to the clerk of the errors in the Exchequer-chamber, or his deputy<sup>p</sup>. If a writ of error be brought in parliament, on a judgment in the King's-Bench, the chief-justice goes in person, attended by the clerk of the errors, to the House of Lords, with the record itself, and a transcript, which is examined and left there; and then the record is brought back again into the King's-Bench, and if the judgment be affirmed, that court may proceed on the record to grant execution: for if the record itself should be removed, and judgment affirmed, and the parliament dissolved, there could  
not

<sup>n</sup> L. P. E. 35.

<sup>o</sup> Append. Chap. XLIII. § 22, 3. In the Common-Pleas, it is usual for the chief-justice to sign the return; 1 Sid. 268. Barnes, 201. but this does not seem to be absolutely necessary: At least, the court of King's-Bench will not stay

the proceedings, for want of his signature. And though the writ of error requires the record to be sent *sub sigillo*, yet this is never practised. 2 Str. 1063, 4. Cas. temp. Hardw. 344. S. C.

<sup>p</sup> L. P. E. 35.

not be any proceedings thereupon to have execution <sup>q</sup>.

On a writ of error from the Common-Pleas, the chief-justice only certifies the body of the record, which is all that remains in his custody; for original and judicial writs remain with the *custos brevium*, and other officers, and are never certified, but where error is assigned for want of them <sup>r</sup>. If the record be not certified in due time, the defendant in error may sign a *nonpros* <sup>s</sup>; but no costs are allowed thereon <sup>t</sup>: And in the Common-Pleas, he cannot take out execution, without a certificate in writing from the clerk of the errors, that the plaintiff in error has made default, in transcribing the record into the King's-Bench <sup>u</sup>.

All the proceedings which have been hitherto mentioned, are in the court *below*, where the judgment was given; but from henceforth they are in the court *above*, to which they are removed.



When the transcript of the record is returned and filed, but not before <sup>v</sup>, the plaintiff in error may move to *amend* the writ of error, or the defendant in error to *quash* it; or it may *abate*, or be *discontinued*.

<sup>q</sup> 2 Bac. Abr. 203.

<sup>r</sup> T. R. 17. L. P. E. 31.

<sup>s</sup> Cro. Eliz. 84.

<sup>u</sup> R. T. & M. 28 Car. II. C.

<sup>t</sup> Append. Chap. XLIII. § P.

<sup>v</sup> 78, &c.

<sup>v</sup> Ld. Raym. 329.

*discontinued.* Of these things therefore I shall treat in their order; and afterwards, of the mode of compelling the plaintiff in error to proceed and assign errors.

Great certainty was formerly required, in making the writ of error agree with the record; for as the writ was the sole authority by which the judges were empowered to act, they could proceed only on that record which the writ or commission authorised them to examine; nor could any defects therein be *amended*, before the 5 *Geo. I. c. 13.* because by the former statutes of amendment, the judges were only enabled to amend in affirmance of the judgment<sup>w</sup>. But now, by the above statute, “all writs of error, wherein there shall be any  
“variance from the original record, or other defect, may and shall be amended, and made  
“agreeable to such record, by the respective courts  
“where such writs of error shall be made returnable,” &c. Upon this statute, it is become the practice to amend the writ of error, as a matter of course, without costs<sup>x</sup>; and it has been amended, by striking out the name of one of the plaintiffs in error<sup>y</sup>: But where a writ of error was returnable before the giving of the judgment on which it was brought,

<sup>w</sup> 2 Bac. Abr. 200. Carth. 368.

<sup>y</sup> 1 Str. 683. 2 Str. 892. Fitzgib. 201. 1 Barnard. K. B.

<sup>x</sup> 2 Str. 863. 902. 2 Ld. Raym. 1587. S. C.

405. 421. S. C. Cowp. 425. 2 Blac. Rep. 1067.

brought, the court on consideration held this to be such a fault, as was not amendable by the statute <sup>z</sup>.

The general ground of *quashing* a writ of error is some fault or defect therein, that is not amendable by the above statute <sup>a</sup>; and the application to quash it ought to be made, either to the court of Chancery, from whence it issues, or to the court wherein it is returnable <sup>b</sup>. Where there are several parties, who are aggrieved by a judgment, and the writ of error is brought by some or one of them only, the court will quash it <sup>c</sup>. But where one of several parties to a judgment, who is not aggrieved thereby, joins in bringing a writ of error, we have just seen, it may be amended <sup>d</sup>, by striking out his name, and stand good for the other parties. And it may be quashed as to one judgment, upon which it does not lie, and stand good for another, upon which it is properly brought <sup>e</sup>. Costs are payable in all cases, on quashing a writ of error, even though none were recoverable in the original action <sup>f</sup>; it being declared by statute <sup>g</sup>, “that upon  
“the quashing any writ of error, for variance  
“from

<sup>z</sup> 2 Str. 807. 2 Ld. Raym. 89. 404. 7 Mod. 3. 5 Mod. 1531. S. C. 2 Str. 891. S. P. 397. Carth. 447. Lil. Ent.

<sup>a</sup> Append. Chap. XLIII. § 225. 290. S. C.

24.

<sup>f</sup> 1 Str. 262. 8 T. R. 302.

<sup>b</sup> Doug. 350.

<sup>g</sup> 4 Ann. c. 16. § 25. and

<sup>c</sup> *Ante*, 1054.

see 2 Str. 834. Cas. *templ.*

<sup>d</sup> *Ante*, 1094.

Hardw. 137.

<sup>e</sup> 1 Ld. Raym. 328. 1 Salk.

“ from the original record, or other defect, the  
 “ defendant in error shall recover against the plain-  
 “ tiff his costs, as he should have had if the judg-  
 “ ment had been affirmed, and to be recovered in  
 “ the same manner:” which costs include those  
 of quashing the writ of error<sup>h</sup>. But where the  
 defendant in error enters continuances on the ori-  
 ginal judgment, to defeat the writ of error, the  
 plaintiff is not liable to costs on quashing it<sup>i</sup>.

A writ of error may *abate* by the act of God, the  
 act of law, or the act of the party. If the *plaintiff*  
 in error die, before errors assigned, the writ abates;  
 and the defendant in error may thereupon sue out  
 a *scire facias quare executionem non*, to revive the  
 judgment, against the executors or administrators  
 of the plaintiff in error<sup>k</sup>. But if the plaintiff in  
 error die, after errors assigned, it does not abate  
 the writ<sup>k</sup>: In such case, the defendant having joined  
 in error, may proceed to get the judgment affirm-  
 ed, if not erroneous; but must then revive it,  
 against the executors or administrators of the plain-  
 tiff in error<sup>k</sup>. And a writ of error does in no case  
 abate, by the death of the *defendant* in error, whe-  
 ther it happen before or after errors assigned: If it  
 happen before, and the plaintiff will not assign  
 errors, the executors or administrators of the de-  
 fendant

<sup>h</sup> 2 Ld. Raym. 1403. 1 Str. Barnes, 270.

606. 8 Mod. 316. S. C.

<sup>k</sup> 2 Crompt. 401, 2.

<sup>i</sup> 1 Str. 139. 2 Str. 834.



fendant in error may have a *scire facias quare executionem non*, in order to compel him<sup>1</sup>; or if it happen after, they must proceed as if the defendant in error were living, till judgment be affirmed, and then revive by *scire facias*, but cannot take out execution pending the writ of error<sup>m</sup>: And in order to compel the executors or administrators to join in error, the plaintiff may sue out a *scire facias ad audiendum errores*<sup>n</sup>, either generally or naming them<sup>o</sup>. If there be several *plaintiffs* in error, the death of one of them abates the writ<sup>p</sup>; but if there be several *defendants* in error, and one of them die, it is otherwise, for they are not named in the writ<sup>q</sup>: In the latter case, the death being suggested on the roll<sup>r</sup>, the writ of error proceeds against the survivors. By the *death* of the chief-justice, before he has made or signed his return, the writ of error becomes ineffectual<sup>s</sup>; and the defendant in error, by leave of the court, may take out execution<sup>t</sup>: but if the return be signed in his life-time, it may be

<sup>1</sup> Yelv. 112, 13. 1 Vent. 34.      <sup>p</sup> Yelv. 208, 9. 1 Salk. 261.  
<sup>1</sup> Salk. 264. Barnes, 432. L. Carth. 236. S. C. 1 Ld. Raym.  
P. E. 114.      244. 1 Salk. 319. S. C.  
<sup>m</sup> L. P. E. 114.      <sup>q</sup> Godb. 66. 68. 1 Ld. Raym.  
<sup>n</sup> Yelv. 112, 13. 1 Sid. 419. 439. 1 Salk. 264. S. C.  
<sup>2</sup> Vent. 34. 1 Salk. 264. 1 Ld.      <sup>r</sup> Lil. Ent. 217.  
Raym. 439. S. C. *Id.* 71.      <sup>s</sup> 1 Keb. 658. 686.  
1295. S. P.      <sup>t</sup> Barnes, 201. Prac. Reg.  
<sup>o</sup> 2 Bulst. 230, 31.      C. P. 195. S. C.

be made afterwards <sup>u</sup>; and though it be neither made nor signed, yet if the defendant in error take out execution, without leave of the court, it is irregular <sup>v</sup>.

It was formerly holden, that a writ of error in the House of Lords abated by the *dissolution* of parliament <sup>w</sup>, or even by the *prorogation* of it <sup>x</sup>; but afterwards the lords declared, that a writ of error should not determine by the prorogation of parliament <sup>y</sup>; and at length it was ordered, that upon a dissolution, all appeals and writs of error should continue, and be proceeded on in *statu quo*, as they stood at the dissolution of the last parliament <sup>z</sup>. If a writ of error be brought in the Exchequer-chamber, and that being discontinued, another be brought in parliament, this second writ is a *superseas* of execution; but if a writ of error be brought in parliament, and abate, and the plaintiff bring a second, this is no *supersedeas*, because it is in the same court <sup>a</sup>.

*Bankruptcy* is no abatement of a writ of error: therefore, where the defendant in error becomes bankrupt,

<sup>u</sup> 1 Sid. 268.

<sup>v</sup> Barnes, 201. Prac. Reg. C. P. 195. S. C.

<sup>w</sup> Cro. Jac. 342. 2 Bulst. 163. S. C. T. Raym. 5.

<sup>x</sup> 1 Vent. 31. 1 Sid. 413. S. C. 1 Vent. 266.

<sup>y</sup> 1 Lev. 165. 2 Lev. 93. 1 Mod. 106. S. C. 1 Vent. 266. S. P.

<sup>z</sup> T. Raym. 383. Com. Dig. tit. *Parliament*, P. 2. but see 1 Vent. 266. 2 Crompt. 391.

<sup>a</sup> 1 Vent. 100. 1 Mod. 285.

bankrupt, his assignees cannot sue out a *scire facias* in their own names, to compel an assignment of errors, but should proceed in the bankrupt's name till judgment <sup>b</sup>. But the writ of error abates, by the marriage of a *feme plaintiff* in error <sup>c</sup>. And where to a *scire facias quare executionem non*, the plaintiff in error pleaded in abatement, that the *defendant* in error was married since the judgment, and before the issuing of the *scire facias*, the defendant moved to quash her own writ, which was granted without costs <sup>d</sup>.

If the writ of error be not quashed or abated, the plaintiff in error may, after the record is certified, forthwith proceed to assign his errors. And it was formerly holden, that after the record was certified, the plaintiff in error must have assigned his errors, and sued out a *scire facias ad audiendum errores*, to bring in the defendant in error, the same term, or the term next after the record was certified, otherwise the whole matter was *discontinued* <sup>e</sup>: But it has been since determined, that if the plaintiff in error lie still, after a writ of error brought, and do not assign errors, this is no discontinuance of the writ of error <sup>f</sup>; though it is otherwise, if he make default after errors assigned.

If

<sup>b</sup> 1 T. R. 463.

<sup>c</sup> F. N. B. 20.

<sup>c</sup> 2 Str. 880. 1015.

<sup>f</sup> 3 Salk. 145.

<sup>d</sup> 1 Str. 638.

If the plaintiff in error will not proceed, after the record is certified, the defendant, in order to compel him, should sue out a writ of *scire facias quare executionem non* in the King's-Bench, except on a writ of error *coram nobis*, or by the plaintiff to reverse his own judgment; and in the Exchequer-chamber, he should give a rule for the plaintiff to allege *diminution*, or that the record is not duly certified or transcribed.

In the King's-Bench, we may remember <sup>g</sup>, as the parties have no day in court given to either of them, on the removal of the record by writ of error, the defendant in error hath no other way of compelling the plaintiff to assign his errors, than by suing out a writ of *scire facias quare executionem non*, &c. <sup>h</sup>; and if, upon such writ, the plaintiff in error do not assign errors, but suffer judgment to pass by default upon *scire feci*, or two *nihils*, no errors afterwards assigned shall prevent execution <sup>i</sup>.

The *scire facias quare executionem non* is a judicial writ, issuing out of the court of King's-Bench, where the record is supposed to be; and the intent of it is, to bring in the plaintiff in error to assign his errors: Therefore, where a *scire facias* was prayed by one of several defendants in error, the fault

<sup>g</sup> *Ante*, 1009, 10.

<sup>i</sup> *Carth.* 40, 41.

<sup>h</sup> *Godb.* 68. 2 *Leon.* 107.

fault was holden to be cured by the plaintiff's coming in upon it, and assigning his errors<sup>k</sup>. This writ may issue immediately after the record is certified, though before the rule for certifying it is expired<sup>l</sup>; and should be directed to the sheriff of the county in which the action was laid. In point of form, it pursues the judgment of the Common-Pleas, the record and proceedings whereof are stated to have been brought, for certain causes of error, into the King's-Bench<sup>m</sup>: And it should be made returnable on a general return-day, or day certain, according to the nature of the proceedings; if by *original*-writ, on a general return-day, *ubicunque*<sup>n</sup>, &c. but if by *bill*, or attachment of privilege, on a day certain, at *Westminster*<sup>o</sup>. If the transcript be brought in by the essoign-day of the term, the *scire facias* may bear teste on the last day of the preceding term; or if brought in within the term, on the first day of that term<sup>p</sup>. And if there be only one writ, there should be fifteen days between the teste and return, by *original*; or if there be two writs, between the teste of the first, and return of the second<sup>q</sup>. The *alias* in such case cannot issue, before

<sup>k</sup> 3 Bur. 1791, 2.

<sup>l</sup> 2 T. R. 17.

<sup>m</sup> Append. Chap. XLII. § 41, 2.

<sup>n</sup> 2 Leon. 107. and see 6 Mod. 86. 3 Salk. 320.

<sup>o</sup> 1 Str. 694. 2 Ld. Raym.

1417. S. C.

<sup>p</sup> 2 Crompt. 345, 6. Imp. K. B. 683. L. P. E. 38.

<sup>q</sup> 2 Crompt. 346.



before the return of the former writ; and ought to be tested, by *original*, on the *quarto die post* of the return of that writ, or by *bill*, on the very return-day<sup>r</sup>. A *scire facias* in error need not lie four days in the office, as a *scire facias* against bail must<sup>s</sup>.

On the return-day of the *scire facias*, if *scire feci* be returned, or of the *alias* writ, if there be two *ni-hils*, the defendant in error must give a *rule to appear*<sup>t</sup>, with the clerk of the rules, which expires in *four* days exclusive<sup>u</sup>. Within that time, the plaintiff in error might formerly have appeared, and pleaded to the *scire facias*, in this as in other cases<sup>v</sup>; and there was an old rule, that if the party pleaded to the *scire facias*, and it went against him, execution might be sued out, but that the writ of error should go on notwithstanding<sup>w</sup>. Afterwards, the court, in consideration of the delay arising from this practice, established it as a standing rule for the future, that if upon the return of the *scire facias*, the plaintiff assigned his errors, then all farther proceedings should be stayed upon it; but where he chose to stand out upon pleadings to the  
*scire*

<sup>r</sup> 2 Salk. 699. Imp. K. B.  
683.

<sup>u</sup> 2 Crompton. 347.

<sup>v</sup> Yelv. 6, 7. Carth. 40, 41.

<sup>s</sup> 3 Bur. 1723. 4 Bur. 2439. 3 Salk. 145. 1 Str. 638.

<sup>t</sup> Append. Chap. XLIII. § 1 Str. 391.

*scire facias*, execution should go, if it were adjudged against him <sup>x</sup>. From this time, the court appear to have discountenanced pleadings upon the *scire facias*, and in some instances to have set them aside <sup>y</sup>. At present, the *scire facias* is considered merely as a means of compelling an assignment of errors <sup>z</sup>; and it seems to be the practice now, to admit of no plea thereto, by the plaintiff in error <sup>a</sup>. If errors are assigned, before the expiration of the rule to appear to the *scire facias*, all farther proceedings upon it are stayed of course; but if the plaintiff do not assign his errors, and give a copy of them to the defendant's attorney in error, before the time allowed by the rule on the *scire facias* is expired, the attorney for the defendant in error may enter judgment on the *scire facias*, and take out execution thereon: but the writ of error still remains in force; and the defendant in error can have no costs, unless he give a rule for the plaintiff to assign errors <sup>b</sup>.

*Diminution* is either of the body of the record, or of its out-branches, as of the original writ, warrant of attorney, &c. If the judges of the Common-Pleas, or other judges, upon a writ of error, do

<sup>x</sup> 1 Str. 391.

<sup>z</sup> *Ante*, 1101.

<sup>y</sup> *Id.* 679. 2 Ld. Raym.

<sup>a</sup> 2 Crompt. 348.

1414. S. C. and see 3 Bur.

<sup>b</sup> 2 Bac. Abr. 216. and see

1792. 1 T. R. 463.

2 Crom. 347.

do not certify all the record, the party that sues the writ of error may allege diminution of the record, and pray a writ to the justices, who certified the record before, to certify the whole of it <sup>c</sup>. But it is a rule, that a man cannot allege diminution, contrary to the record which is certified; as if, on a writ of error, it be certified that the judgment was, that the defendant should be *in misericordiâ*, the defendant in error cannot allege for diminution, that the record is *quod capiatur*, because this is contrary to the record certified <sup>d</sup>. And, except in *Wales* and the counties-*palatine* <sup>e</sup>, diminution cannot be alleged, upon a writ of error brought on a judgment in any inferior court <sup>f</sup>.

The *rule to allege diminution* is an *eight-day rule*, given by the clerk of the errors in the Exchequer-chamber <sup>g</sup>; and if the writ of error be returnable the first

<sup>c</sup> 2 Bac. Abr. 204. F. N. B. 25. a. and see Cro. Eliz. 155. 281. 1 Nels. Abr. 658.

<sup>d</sup> 1 Rol. Abr. 764. Godb. 267. And in a late case, where a writ of error was brought in parliament, on a judgment of the court of Exchequer in *Ireland*, affirmed in the Exchequer-chamber there, the House of Lords held that diminution could not be alleged in the body of the record, contrary to the *transcript*; and re-

fused to issue a *certiorari* for verifying it. *Rowe v. Power, ex dem. Boyse and another*, in Error. *Dom. Proc. die Mart.* 8 Mar. 1803. but see 1 Bulst. 181. 2 Lil. Abr. 422. 1 Salk. 49. Lil. Ent. 226. 245. 556. 559. 565.

<sup>e</sup> 1 Sid. 147. 364. 1 Salk. 266. *in marg.* *Id.* 270. Lil. Ent. 226. 245.

<sup>f</sup> 1 Sid. 40. 1 Salk. 266.

<sup>g</sup> Append. Chap. XLIII. § 26.

first day of term, the plaintiff in error is to transcribe the same term, allege diminution the term following, assign errors the next term, and argue them the fourth term: but if the defendant in error, instead of serving the rule to transcribe at the return of the writ, neglect it for a term or two, the plaintiff must transcribe in that term in which the rule is served, allege diminution the same term, assign errors the term following, and argue them the third term<sup>h</sup>. A copy of the rule to allege diminution being made, and served on the attorney for the plaintiff in error, it is incumbent on him to allege diminution, within the eight days allowed by the rule; and if he neglect to do so, the clerk of the errors, on being applied to, with an affidavit of the service of a copy of the rule, will sign a *nonpros*<sup>i</sup>, and tax the defendant in error his costs; but unless an affidavit be made, he usually sends to the attorney for the plaintiff in error, and if diminution be not alleged by the next morning, he will then sign the *nonpros* of course, and tax the costs<sup>k</sup>.

When the plaintiff in error has alleged diminution, the next step to be taken by the defendant in error, is to give a *rule* for the plaintiff to assign errors; which is the *first* proceeding on a writ of error *coram nobis*, and may be given immediately after the allowance and notice of the writ of error<sup>l</sup>:

It

<sup>h</sup> L. P. E. 92.

<sup>k</sup> Imp. K. B. 675.

<sup>i</sup> Append. Chap. XLIII: § 78, &c.

<sup>l</sup> 2 Crompt. 394. Imp. K. B. 734. L. P. E. 78.

It is also the first proceeding after the transcript is brought in, on a writ of error by the plaintiff to reverse his own judgment <sup>m</sup>. In the King's-Bench, this is a *four-day* rule, given by the master <sup>n</sup>, on the expiration of the rule to appear to the *scire facias* <sup>o</sup>; and after being entered with the clerk of the rules, a copy of it should be made, and served on the attorney for the plaintiff in error.

In the Exchequer-chamber, if the plaintiff in error allege diminution, the rule to assign errors is given the next term, with the clerk of the errors, in like manner as the rule to allege diminution, and expires in eight days after service <sup>p</sup>. On a writ of error returnable in parliament, when the transcript is brought in, a peer moves the house, without any previous proceeding, for a day to be given the plaintiff in error to assign his errors, which is ordered accordingly <sup>q</sup>; and ought to be done within  
*eight*

<sup>m</sup> 3 Bur. 1771.

<sup>n</sup> Append. Chap. XLIII. § 27.

<sup>o</sup> 6 T. R. 367. and see 2 Str. 917. In the case of *Sambridge v. Housley*, in Error, 2 T. R. 17. it was holden, that the rule to assign errors might be given, at the same time as the rule to appear to the *scire facias*; but according to this determination, the rule to assign errors, which expires in

four days *inclusive*, would have expired before the rule to appear to the *scire facias*, which, we have seen, does not expire till four days *exclusive*: *ante*, 1102. and therefore the practice was altered as above.

<sup>p</sup> Append. Chap. XLIII. § 28.

<sup>q</sup> For the form of the order, see Append. Chap. XLIII. § 29.



*eight* days after the bringing in of the writ of error, with the record<sup>r</sup>. Within the time limited by the rule or order to assign errors, if they are not assigned, the defendant in error may sign a *nonpros*<sup>s</sup>, and is entitled to costs.



An *assignment* of errors is in nature of a declaration<sup>t</sup>; and is either of errors in *fact*, or errors in *law*. The former consist of matters of fact, not appearing on the face of the record, which, if true, prove the judgment to have been erroneous; as that the defendant in the original action, being under age, appeared by attorney<sup>u</sup>; that a *feme*-plaintiff or defendant was under coverture, at the time of commencing the action<sup>v</sup>; or that a sole-plaintiff or defendant died before verdict, or interlocutory judgment<sup>w</sup>: But the defendant in *ejectment* is not allowed to assign for error, the death of the nominal plaintiff<sup>x</sup>. An assignment of errors in fact should conclude with a verification<sup>y</sup>; and in assigning the death

<sup>r</sup> *Ordo Dom. Proc. die Ven.*

<sup>v</sup> *Id.* § 32, 3.

23 Dec. 1661.

<sup>w</sup> *Id.* § 34, &c.

<sup>s</sup> Append. Chap. XLIII. §

<sup>x</sup> 2 Str. 899. but see 1 Sid.

78, &c.

93. T. Raym. 59. S. C. where it was assigned for error.

<sup>t</sup> 2 Bac. Abr. 216.

<sup>u</sup> Append. Chap. XLIII. §

<sup>y</sup> 1 Bur. 410. Carth. 367.

30, 31.

but see Yelv. 58. *contra*.

death of the defendant in error, the assignment ought not to conclude in the common way, but by praying a *scire facias ad audiendum errores* against the executor or administrator of the defendant in error; and if the sheriff return that he is alive, then he may come in and plead *in nullo est erratum*; or his attorney may appear for him, and say that he is alive<sup>z</sup>: but if the sheriff return, that he has warned the executor or administrator, that will be a sufficient ground for the court to proceed and examine the errors<sup>a</sup>.

Errors in *law* are common or special. The *common* errors are, that the declaration is insufficient in law to maintain the action; and that the judgment was given for the plaintiff, instead of the defendant<sup>b</sup>, or *vice versa*: *Special* errors are the want of an original writ<sup>c</sup>, bill, or warrant of attorney<sup>d</sup>; or other matter, appearing on the face of the record, which shews the judgment to have been erroneous. The plaintiff may assign several errors in law, but only one error in fact<sup>e</sup>; and he cannot assign error in fact and error in law together, for these are distinct things, and require different trials<sup>f</sup>. It is also settled, that nothing can be

<sup>z</sup> 1 Sid. 93. T. Raym. 59.  
S. C.

<sup>a</sup> Carth. 339.

<sup>b</sup> Append. Chap. XLIII. §  
38. 57, 8. 65, 6.

<sup>c</sup> *Id.* § 39.

<sup>d</sup> *Id.* § 44. 59.

<sup>e</sup> F. N. B. 20.

<sup>f</sup> 2 Bac. Abr. 217. 2 Ld.  
Raym. 883. 1 Str. 439.

be assigned for error, which contradicts the record<sup>g</sup>, or was for the advantage of the party assigning it<sup>h</sup>; or that is aided by appearance, or not being taken advantage of in due time<sup>i</sup>. Where there are several plaintiffs in error, they must join in assigning errors<sup>k</sup>, unless some of them have been summoned and severed: And where the assignment has been merely calculated for delay, the court have in some instances set it aside<sup>l</sup>. The assignment of errors is engrossed on treble-penny stamped paper, and need not be signed by counsel: In the King's-Bench, it is *delivered* to the defendant's attorney; in the Exchequer-chamber, and House of Lords, it is *filed* with the clerk of the errors, or clerk in parliament.

If the plaintiff assign for error the want of an original writ, bill, or warrant of attorney, &c. or that it is bad in point of law, he should regularly take out a *certiorari*, to verify his errors: for it is a rule, that judgment cannot be reversed, for want of an original writ, bill, or warrant of attorney, nor for any supposed error or defect therein, without a *certiorari*<sup>m</sup>. The error in such case, unless confessed,

<sup>g</sup> 2 Bac. Abr. 218. 1 Str. B. 676.

684. 2 Ld. Raym. 1414. S. C.

1 Wils. 85. S. P.

<sup>h</sup> 2 Bac. Abr. 220. 1 Str. 382.

<sup>i</sup> 2 Bac. Abr. 221. 2 H. Blac. 267. 299.

<sup>k</sup> 2 Bac. Abr. 217. Imp. K.

<sup>l</sup> 1 Str. 141. 545. 2 Str.

899. Lil. Ent. 228. *in marg.*

<sup>m</sup> 9 Edw. IV. 34. b. 1 Rol.

Abr. 764. 2 Ld. Raym. 1398.

1441. Cas. temp. Hardw. 118,

19.

confessed, is not considered to be completely assigned, until it appear, by the return to the *certiorari*, that it is well-founded<sup>n</sup>: And it is said, that the plaintiff in error cannot till then bring in the defendant, to plead to the errors<sup>o</sup>. Also, by the course of the King's-Bench, if diminution be alleged, errors cannot be entered, till the *certiorari* be returned, and the rules to plead are expired<sup>p</sup>.

A *certiorari* is a judicial writ<sup>q</sup>, issuing out of the court where the writ of error is depending, on a proper *præcipe*<sup>r</sup>, and directed to the judge or officer who has the custody of the writ, or other matter to be certified; as to the *custos brevium*, for certifying an original writ<sup>s</sup>, or to the chief-justice, for certifying a bill<sup>t</sup>, or warrant of attorney<sup>u</sup>, &c. This writ is tested in the name of the chief-justice of the King's-Bench, when it issues out of that court; or when it issues out of the Exchequer-chamber, in the name of the chief-justice of the court of  
Common-

<sup>n</sup> Com. Rep. 115.

<sup>o</sup> 2 Ld. Raym. 1047.

<sup>p</sup> 1 Keb. 211.

<sup>q</sup> Barnes, 12.

<sup>r</sup> Append. Chap. XLIII. § 40. 45.

<sup>s</sup> *Id.* § 41.

<sup>t</sup> *Id.* § 60. 62.

<sup>u</sup> *Id.* § 46. 62. For certifying bail in the original action, the admission of an

infant to sue by *prochein ami*, an imparlance or other continuance, or a writ of inquiry, the *certiorari* is directed to the chief-justice of K. B.; but for certifying warrants of attorney, or a writ of inquiry, in C. P. it is directed to the *custos brevium*. Lil. Ent. 555, &c. 2 Ld. Raym. 1476. 1 Wils. 85.

Common-Pleas<sup>v</sup>; and ought not to bear teste, before the assignment of errors<sup>w</sup>. The writ of *certiorari* being signed and sealed, should be delivered to the judge or officer to whom it is directed; and is made returnable *immediatè*, or without delay<sup>x</sup>. It has been doubted, whether the court have power to *amend* this writ<sup>y</sup>.

When a *certiorari* is prayed, the defendant in error may either come in *gratis*, and confess the want of an original, &c. by pleading *in nullo est erratum*<sup>z</sup>, or a release<sup>a</sup>, which renders it unnecessary for the plaintiff in error to sue out a *certiorari*; or, if there be an original, &c. he may go to the master of the office, in the King's-Bench, and get a rule for the plaintiff in error to return his *certiorari*<sup>b</sup>. This is a *four-day* rule, given by the master, on the back of the draft of the *scire facias quare executionem non*; and after being entered with the clerk of the rules, a copy of it is served on the plaintiff's attorney. In the House of Lords, it is a rule, that if the plaintiff

<sup>v</sup> 2 Str. 819. 2 Ld. Raym. 2 Ld. Raym. 1005. 6 Mod. 1554. S. C.

<sup>w</sup> Lil. Ent. 555, &c. Imp. 1047. 3 Salk. 214. 6 Mod. 235. K. B. 680. Holt, 563. S. C.

<sup>x</sup> Lil. Ent. 555, &c.

<sup>y</sup> Barnes, 12.

<sup>z</sup> 1 Salk. 267. 2 Ld. Raym. C. Append. Chap. XLIII. § 1156. S. C. 2 Str. 907. S. P. 42.

<sup>a</sup> 1 Salk. 268. 3 Salk. 399.

<sup>b</sup> Com. Rep. 115. 1 Salk.

267. 2 Ld. Raym. 1156. S.



plaintiff in error allege diminution, and pray a *certiorari*, the clerk shall enter an award thereof accordingly; and the plaintiff may, before *in nullo est erratum* pleaded, sue forth the writ of *certiorari* in ordinary course, without special petition, or motion to the house, for the same; and if he do not prosecute such writ, and procure it to be returned, within *ten* days next after his plea of diminution put in, then, unless he shall shew good cause to the House, for enlarging the time for the return of such writ, he shall lose the benefit of the same, and the defendant in error may proceed, as if no such writ of *certiorari* were awarded<sup>c</sup>. This is the common course of proceeding: but if the House be soon about to rise, they will, upon petition, of which there must be two days previous notice, order the plaintiff in error to return the writ of *certiorari* by a short day.

Within the time allowed to the plaintiff in error, for the return of the *certiorari*, he either gets it returned, or not: If it be not returned, the assignment of the want of an original, &c. is of no effect; and the defendant in error having entered on record a *non misit breve*<sup>d</sup>, may, notwithstanding such assignment, plead *in nullo est erratum*, and proceed to affirm the judgment<sup>e</sup>. If a return be made to the writ

<sup>c</sup> *Ordo Dom. Proc. die Ven.* 54.

13 Dec. 1661.

<sup>e</sup> 1 Salk. 267. 2 Ld. Raym.

<sup>d</sup> Append. Chap. XLIII. § 1156. S. C. 2 Crompt. 374.

writ of *certiorari*, it is either that there is, or is not an original writ, bill, or warrant of attorney, &c.<sup>f</sup>. And as diminution cannot be alleged, so it is a rule, that a matter cannot be returned to the *certiorari*, contrary to the record<sup>g</sup>. The return being made, is filed in the treasury of the court, where the defendant's attorney should search for it.

We have already seen<sup>h</sup>, that the want of an original writ or bill is aided after verdict, by the statute 18 *Eliz.* c. 14. but not after judgment by default or confession, or upon demurrer or *nul tiel record*. Therefore, if the want of an original after verdict be assigned for error, the defendant in error may confess it, by pleading *in nullo est erratum*: But if a writ of error be brought after a judgment by default, &c. it is usual for the defendant in error, if there be no original already sued out, to present a *petition*<sup>i</sup> to the Master of the Rolls, praying that the cursitor of the county where the venue is laid, may be directed to issue an original, with a proper return<sup>k</sup>. This petition must be presented, before the defendant in error takes out a rule for the plaintiff to return the *certiorari*: And an order<sup>l</sup> being obtained thereon, a copy of the petition and order should be forthwith served on the adverse attorney; and

<sup>f</sup> Append. Chap. XLIII. § 43. 47. 63.

<sup>g</sup> 2 *Ld. Raym.* 1123, 4.

<sup>h</sup> *Ante*, 102.

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<sup>i</sup> Append. Chap. V. § 15.

<sup>k</sup> *Ante*, 103, 4. and see 6 T. R. 544.

<sup>l</sup> Append. Chap. V. § 17.

and if he do not in two or three days make his election, either to accept the costs in error, or prosecute his writ, the costs in error must be tendered him; and if he accept thereof, the defendant in error may immediately sign a *nonpros*, and after entering a *remittitur*, take out execution on the judgment <sup>m</sup>; but if he refuse to accept the costs, choosing rather to prosecute his writ of error, the petition and order should be delivered to the cur-  
sitor, who will make out the original writ, which must be returned by the sheriff, and then filed with the *custos brevium* <sup>n</sup>. The same course is observed, after an *amendment* of the proceedings in the original action, pending a writ of error; upon which the plaintiff in error may make his election, either to accept the costs, or prosecute his writ <sup>o</sup>.

The plaintiff in error can have but one writ of *certiorari* <sup>p</sup>: Therefore, where he took out a *certiorari* of a wrong term, which did not verify his error, and afterwards moved for a second *certiorari*, it was denied him; the court saying, it may be granted to affirm, but not to reverse a judgment <sup>q</sup>. But if it be certified, on the plaintiff's writ, that there is no original <sup>r</sup>, or warrant of attorney <sup>s</sup>, or one

<sup>m</sup> L. P. E. 30.

319. S. P.

<sup>n</sup> *Id.* 31, 32.

<sup>r</sup> Cro. Car. 91.

<sup>o</sup> *Ante*, 664.

<sup>s</sup> Cro. Jac. 277. 1 Salk. 266.

<sup>p</sup> Cro. Jac. 597.

6 Mod. 174. S. C.

<sup>q</sup> 2 Str. 765. and see *id.*

one that is bad, or warrants not the declaration <sup>t</sup>, the defendant in error may, at any time before *in nullo est erratum* pleaded, make a suggestion that there is an original or warrant of attorney, or a good one of a different term, or even of the same term with the *placita* <sup>u</sup>, and pray a *certiorari* for certifying it; and if a good original be returned, the court will not inquire when it was filed; or if a bad original was before certified, they will disregard it, and apply the record to that which is good and will support the judgment. But it is a rule <sup>v</sup>, that no *certiorari* upon a writ of error, shall be sued out or made by any attorney, after a *certiorari* in the same cause hath been already sued out and returned, without motion in court by counsel.

In the King's-Bench, as the parties have no day in court after the record is removed, the plaintiff in error may, after he has assigned his errors, have a *scire facias ad audiendum errores* <sup>w</sup> against the defendant, who thereupon may appear and plead *in nullo est erratum*, or a release <sup>x</sup>, &c. But in practice it is usual for the defendant in error, by consent, to take notice voluntarily of the assignment of errors; which consent is testified by his pleading  
*in*

<sup>t</sup> 1 Rol. Abr. 765. Cro. Jac. 130. 597. Cro. Car. 410.

<sup>u</sup> Com. Rep. 118. 1 Salk. 267. 2 Ld. Raym. 1476.

<sup>v</sup> R. E. 11 Car. I.

<sup>w</sup> Append. Chap. XLIII. § 48, &c.

<sup>x</sup> 2 Bac. Abr. 207. F. N. B. 44.



*in nullo est erratum*, and then there is no occasion for a *scire facias ad audiendum errores* <sup>y</sup>. Where a *scire facias* is sued out, and the defendant does not appear and join in error, the plaintiff may move to reverse the judgment, upon producing the record of the *scire facias*, with the sheriff's return of *scire feci*, and an entry of the defendant's default, without taking out a rule to join in error <sup>z</sup>, and even without moving for a *concilium*, or putting the cause in the paper <sup>a</sup>.

The Exchequer-chamber not having the record before them, but only a transcript, do not award a *scire facias ad audiendum errores*, but notice is given to the parties concerned <sup>b</sup>: And in the House of Lords, the plaintiff must get a peer to move the house, that on assigning errors, the defendant may appear and make his defence. In error to reverse a common-recovery, there ought to be a *scire facias* against the tertendants, *ad audiendum processum et recordum* <sup>c</sup>; but to this they can only plead a release of errors <sup>d</sup>.

To an assignment of errors, the defendant may plead or demur. Pleas in error are common or special. The *common* plea, or *joinder*, as it is more frequently

<sup>y</sup> Carth. 41.

<sup>z</sup> 1 Str. 144.

<sup>a</sup> 2 Str. 1210.

<sup>b</sup> 1 Vent. 34.

<sup>c</sup> 1 Leon. 290. 1 Lev. 72.  
Carth. 111. Append. Chap.  
XLIII. § 52.

<sup>d</sup> 1 Bur. 360. *Ante*, 1034.



frequently called, is *in nullo est erratum*<sup>e</sup>, or that there is no error in the record or proceedings: which is in the nature of a demurrer, and at once refers the matter of law arising thereon, to the judgment of the court.

If the plaintiff in error assign an error in fact, and the defendant in error would put in issue the truth of it, he ought to traverse or deny the fact, and so join issue thereupon, and not say *in nullo est erratum*; for by so doing, he would acknowledge the fact alleged to be true<sup>s</sup>: But when an error in fact is assigned, if the defendant would acknowledge the fact to be as alleged, and yet insist that by law it is not error, he ought to rejoin *in nullo est erratum*<sup>f</sup>. Hence it appears, that if an error in fact be well assigned, *in nullo est erratum* is a confession of it; for the defendant ought to have joined issue thereon, so as to have it tried by the country: But if an error in fact be assigned that is not assignable, or be ill assigned, *in nullo est erratum* is no confession of it, but shall be taken only for a demurrer<sup>g</sup>.

If error be alleged in the body of the record, *in nullo est erratum* is a good rejoinder; for this shall put the matter in the judgment of the court, the record

<sup>e</sup> Append. Chap. XLIII. § 53; 4. 64. 67.

<sup>f</sup> 1 Rol. Abr. 763.

<sup>g</sup> 2 Bac. Abr. 218

cord being agreed to be as stated<sup>b</sup>. So if error be alleged in a matter of record, which is not of the body of the record, but in a collateral thing, as that there is no record of resummons, *in nullo est erratum* is a good rejoinder; for if the plaintiff in error do not allege diminution, and thereupon procure a certificate from the inferior court, that there is not any resummons, before the rejoinder entered, the assignment is of no effect, but void, inasmuch as this is to be tried by the record itself, and no diminution can be alleged after rejoinder entered; and though the defendant confess the error, yet the court ought not to reverse the judgment, till they are satisfied it is erroneous by the record itself<sup>i</sup>. If the plaintiff in error assign error in fact and error in law, which we have seen cannot be assigned together, and the defendant in error plead *in nullo est erratum*, this is a confession of the error in fact, and the judgment must be reversed<sup>k</sup>; for he should have demurred for the duplicity, upon which the judgment would have been affirmed<sup>l</sup>.

By pleading *in nullo est erratum*, the defendant in error admits the record to be perfect, the effect of  
his

<sup>b</sup> 1 Rol. Abr. 763.

338, 9. Comb. 321. S. C.

<sup>i</sup> *Id.* 764. 9 Edw. IV. 32. b.

<sup>l</sup> 2 Ld. Raym. 883. 1 Str.

<sup>k</sup> 2 Bac. Abr. 218. Carth. 439.

his plea being, that the record in its present state is without error<sup>m</sup>; and therefore, after *in nullo est erratum* pleaded, neither party can allege diminution, or pray a *certiorari*<sup>n</sup>. But though the parties are bound by their own admission, and that equally so as to every part of the record, yet no admission of the parties can or ought to restrain the court from looking into the record before them<sup>o</sup>. Hence it is a general rule, that at any time pending a writ of error, whether before<sup>p</sup> or after errors assigned, or even after *in nullo est erratum* pleaded<sup>q</sup>, the court *ex officio* may award a *certiorari*; and they may do this to supply a defect in the body of the record<sup>r</sup>, as well as in its out-branches.

When the plaintiff assigns for error the want of an original or warrant of attorney, and the defendant comes in *gratis*, and confesses the matter assigned for error, by pleading *in nullo est erratum*<sup>s</sup>, or a release<sup>t</sup>, without putting the plaintiff to the necessity of suing out a *certiorari*, to verify his errors, the court, for their own information, may award this writ, in order if possible to support the judgment. And so if error be assigned in the original

<sup>m</sup> 1 Salk. 270.

Cas. *tempi*. Hardw. 118, 19.

<sup>n</sup> *Id.* 269. 2 Crompt. 378.

<sup>r</sup> 1 Salk. 270.

<sup>o</sup> *Id.* 270.

<sup>s</sup> 2 Str. 907.

<sup>p</sup> 1 Str. 440.

<sup>t</sup> 1 Salk. 268. 2 Ld. Raym.

<sup>q</sup> 1 Rol. Abr. 764, 5. 1 Salk. 1005. S. C.

269. 2 Ld. Raym. 1005. S. C.

ginal writ, and upon a *certiorari* granted, an erroneous original be returned, upon which *in nullo est erratum* is pleaded, and after the court grant a second *certiorari* for another original, and upon this a good original is certified, the court will intend this to be the original on which the judgment was given, in favour of judgments, which ought to be intended good, till the contrary is manifest<sup>u</sup>. But though the court *ex officio* will award a *certiorari* to affirm a judgment, yet they will never award one to reverse it, or make error<sup>v</sup>.

*Special* pleas to an assignment of errors contain matters in confession and avoidance, as a release of errors<sup>w</sup>, or the statute of limitations<sup>x</sup>, &c. to which the plaintiff in error may reply or demur, and proceed to trial or argument. A release of errors contained in a warrant of attorney to confess a judgment is good, though given before judgment, provided it be dated in the term of which the judgment is entered up<sup>y</sup>: But where there are several plaintiffs in error, the release of one

<sup>u</sup> 1 Rol. Abr. 765. *Ante*, 102, 3.

<sup>v</sup> 1 Salk. 269. 2 Str. 765. 319. 907. Cas. *temp*. Hardw. 118, 19. but see 2 Bac. Abr. 205. and the cases there cited, by which it appears, that formerly the court would have

granted a *certiorari* to reverse the judgment, as well as to affirm it.

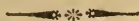
<sup>w</sup> 2 Bac. Abr. 225. Append. Chap. XLIII. § 55, 6.

<sup>x</sup> Stat. 10 & 11 W. III. c. 14.

<sup>y</sup> 2 Str. 1215.

one of them shall not bar the others<sup>2</sup>. In pleading a release, the defendant must lay a venue; but though it be ill pleaded, yet if there are no errors, the court will affirm the judgment<sup>a</sup>. Where error is brought on a judgment that the *parol* shall demur, the non-age cannot be pleaded again, for that would be *exceptio ejusdem rei, cujus petitur dissolutio*<sup>b</sup>.

The plea or joinder in error, &c. is engrossed on treble-penny stamped paper; and if common, need not be signed by counsel. In the King's-Bench, it is *delivered* to the plaintiff's attorney<sup>c</sup>: In the Exchequer-chamber, or House of Lords, it is *filed* with the clerk of the errors, or clerk in parliament.



*Issue* being joined in error, the proceedings are *entered* of record: And on a writ of error *coram nobis*, they must be entered on the same roll as the original judgment, or former writ of error<sup>d</sup>. On a writ of error from the Common-Pleas, the entry is made by the attorney for the plaintiff in error<sup>e</sup>,  
on

<sup>2</sup> Cro. Eliz. 648, 9. Cro. 1433. S. C.

Jac. 116, 17. 3 Mod. 135.

<sup>c</sup> *Ante*, 622.

<sup>a</sup> 1 Salk. 268. 3 Salk. 399.

<sup>d</sup> Cro. Eliz. 155. 281. 1

<sup>2</sup> Ld. Raym. 1005. 6 Mod. Ld. Raym. 151. Carth. 369.  
113. 206. S. C.

<sup>b</sup> 2 Str. 861. 2 Ld. Raym.

<sup>c</sup> *Ante*, 666.



on different rolls, intituled of the term the transcript is brought in; and begins with the writ of error and return, after which the proceedings in the Common-Pleas are entered, to the end of the final judgment; then follows the assignment of errors, and if it be of errors in fact, the plea and replication, &c. are next entered, with an award of the *venire facias*<sup>f</sup>, or if it be of errors in law, there is an entry of the joinder, with a continuance by *curia advisari vult*<sup>g</sup>.

On an issue in *fact*, a record of *nisi prius*<sup>h</sup> is made up, and the parties proceed to trial, as in common cases; and after verdict, the party for whom it is found, must move to put the cause in the paper for argument<sup>i</sup>; and then, on producing the *postea*, the court will give judgment, according to the finding: In this case, the defendant, as well as the plaintiff, may carry down the cause to trial, without a rule for trying it by *proviso*.

On an issue in *law*, either party may move for a *concilium*<sup>k</sup> in the King's Bench, draw up and serve the rule, enter the cause with the clerk of the papers, and proceed to argument, as on demurrer. Previous to the day of argument, copies of the books, or proceedings in error, should be delivered  
(as

<sup>f</sup> Append. Chap. XLIII. §  
68.

<sup>g</sup> *Id.* § 69, &c.

<sup>h</sup> *Id.* 77.

<sup>i</sup> 1 Str. 627.

<sup>k</sup> Append. Chap. XLIII. §  
75.

(as on demurrer,) by the plaintiff or his attorney, on unstamped paper, to the chief-justice and *senior* judge, and by the defendant or his attorney, to the other judges<sup>1</sup>; in which should be inserted the names of the counsel who signed the pleadings<sup>m</sup>: and the exceptions intended to be insisted upon in argument should be marked in the margin<sup>n</sup>. If either party neglect to deliver the books, they ought to be delivered by the other; and in that case, the party neglecting cannot be heard, but judgment will of course be given against him<sup>o</sup>.

In the Exchequer-chamber, there are no more than two return-days in every term; one is called the general *affirmance*-day, being appointed by the judges of the Common-Pleas, and barons of the Exchequer, to be held a few days after the beginning of every term, for the general affirmance or reversal of judgments, the other is called the *adjournment*-day, which is usually held a day or two before the end of every term. On the first of these days, judgments are affirmed or reversed, or writs of error nonprossed; the intent of the latter is to finish such matters as were left undone at the former; on which last-mentioned day also, as well as on the first, judgments may be affirmed or reversed, or writs

<sup>1</sup> R. M. 17 Car. I. and see      <sup>n</sup> R. E. 2 Jac. II. revived  
 3 R. E. 2 Jac. II. (a). R. T. by R. H. 38 G. III.  
 40 G. III. 1 East, 131. *Ante*,      <sup>o</sup> R. M. 17 Car. I. Imp. K.  
 687.      B. 686.

<sup>m</sup> R. E. 18 Car. II.

writs of error nonprossed, on paying an additional fee to the clerk of the errors, and setting down the cause two days before the adjournment-day<sup>p</sup>.

The proceedings in this court are entered by the clerk of the errors, who sets down the cause, at the instance of either party, without a motion for a *concilium*: In making the entry, after setting forth the writ of error and return, and the proceedings in the court of King's-Bench, a day is given to the plaintiff to assign errors; after which, the assignment of errors, and other subsequent proceedings, are entered on the return-days they are put in, with a separate *placita* for each day<sup>q</sup>. It is a rule, in the Exchequer-chamber, that no copy of error and record thereupon be delivered to the justices or barons, before the attorney for the plaintiff in error shall have given *ten* days notice, to the clerk of the errors in the Exchequer-chamber, that the error assigned in the record is to be argued, before the said justices and barons, for both parties; and that the attorney for the plaintiff shall deliver four copies to the justices of the Common-Pleas, and the attorney for the defendant shall deliver four other copies to the barons of the Exchequer, *four* days before the hearing of the cause<sup>r</sup>: To enable the parties to deliver these copies, a transcript of  
the

<sup>p</sup> L. P. E. 181, 2.

<sup>r</sup> R. E. 33 Car. II. Imp.

<sup>q</sup> *Id.* 175, &c. Append. K. B. 677.

Chap. XLIII. § 76, &c.

the proceedings is made for them, by the clerk of the errors.

In the House of Lords, when the defendant hath joined in error, the cause is set down, on the motion of a peer, to be heard in turn; after which, if the house is likely to be soon up, either party may on petition\*, of which two days previous notice should be given to the other, have the cause appointed for a short day. And when a day is appointed for hearing the cause, the same cannot be altered, but upon petition; and no petition can in such case be received, unless *two* days notice thereof be given to the adverse party, of which notice oath is to be made at the bar of the house†. Previous to the argument, the *cases* for both parties must be drawn up, and signed by counsel‡; and it is usual to deliver 250 printed copies of it on each side, at the Parliament-office, some of which are given to the lords, and others to the judges.

On the day appointed for argument, the counsel for the parties are heard, being previously instructed, and furnished with copies of the paper-books, or printed cases; and if there be no argument, one of them moves for judgment of affirmance or reversal. If the errors be argued, one counsel only

\* Append. Chap. XLIII. § 22 Dec. 1703.

90.

† *Ordo Dom. Proc. die Mart.*

‡ *Ordo Dom. Proc. die Merc.* 19 Apr. 1698.

only is heard on each side, in the King's-Bench; the counsel for the plaintiff in error begins, the counsel for the defendant is then heard, and the plaintiff's counsel replies<sup>v</sup>: In the House of Lords, no more than two counsel can be heard on each side<sup>w</sup>.



The *judgment* in error, unless the court are equally divided in opinion, is to *affirm*, or to *recall* or *reverse* the former judgment; that the plaintiff be *barred* of his writ of error; or that there be a *venire facias de novo*. The common judgment for the defendant in error, whether the errors assigned be in fact or in law, is that the former judgment be *affirmed*<sup>x</sup>: So on a demurrer to an assignment of errors, in fact and in law, for duplicity, the judgment is *quod affirmetur*<sup>y</sup>. For error in *fact*, the judgment is *recalled*, *revocatur*<sup>z</sup>; and for error in *law*, it is *reversed*<sup>a</sup>. On a plea of release of errors<sup>b</sup>, or the statute of limitations<sup>c</sup>, found for the defendant, the judgment is, that the plaintiff be *barred* of his writ of error. It has already been  
shewn,

<sup>v</sup> *Ante*, 462.

<sup>w</sup> 2 Crompt. 389.

<sup>x</sup> Append. Chap. XLIII. § 83. 86. 91.

<sup>y</sup> Yelv. 58. 2 Ld. Raym. 383. 1 Str. 439.

<sup>z</sup> 2 Bac. Abr. 230.

<sup>a</sup> Append. Chap. XLIII. §

84, 5.

<sup>b</sup> 1 Show. 50. 1 Str. 127. 683. but see Ast. Ent. 339.

1 Str. 382. *semb. contra*.

<sup>c</sup> 2 Str. 1055. Cas. temp. Hardw. 345. S. C.



shewn, in what cases a *venire facias* is grantable *de novo* <sup>d</sup>.

When the court of King's-Bench are equally divided in opinion, upon a writ of error, it seems there can be no rule for affirming or reversing the judgment, without consent; and therefore, in the case of *Thornby v. Fleetwood*<sup>e</sup>, the court being divided in opinion, a rule was made, with the assent and at the instance of the lessor of the plaintiff, to expedite the determination of the cause, in the House of Lords; whereby it was ordered, that the judgment should be affirmed<sup>f</sup>. But in the Exchequer-chamber, it is the practice, upon a division, to affirm the judgment, as was done in the

<sup>d</sup> *Ante*, 831, 2.

<sup>e</sup> 1 Str. 379.

<sup>f</sup> Lil. Ent. 524. By the statute 14 Edw. III. it is provided, "that whereas causes have been delayed for difficulty and division in opinions; therefore to remedy the delays occasioned thereby, there shall in every parliament be chosen a prelate, two earls, and two barons, who by good advice of others are to give judgment, or if they cannot determine it, that then the record shall be brought into parliament, who shall

"make a final accord; and

"the judges before whom the

"cause is depending shall

"proceed to give judgment,

"pursuant to their directions."

But there appear to

be no footsteps for centuries,

of any such appointment of a

prelate, two earls, and two barons;

and the court of King's-Bench,

in the above case, thought it would be improper,

on a writ of error from the

Common-Pleas, to adjourn the

cause for difficulty into the

Exchequer-chamber, or House

of Lords. 1 Str. 383.

the case of *Deighton v. Greenville*<sup>g</sup>: And so is the practice in the House of Lords; which depends on their mode of putting the question to reverse the judgment, a majority being required to reverse it<sup>h</sup>.

A judgment, when entire, cannot regularly be reversed in part, and affirmed for the residue<sup>i</sup>. Therefore, where A. brought an action on the case against B. for words spoken of him, and for causing him to be indicted, &c. and the jury found a verdict for the plaintiff as to both, with *entire* damages, yet it being afterwards holden that the words were not actionable, the judgment was reversed *in toto*<sup>k</sup>: But if part of the words laid be not actionable, and *several* damages are given, it seems that judgment shall be reversed in part only<sup>l</sup>.

Where there are several dependent judgments, and the principal one is reversed, the other cannot be supported: As if a man recover in *debt* upon a judgment, if the first judgment be reversed, the second falls to the ground<sup>m</sup>. But the reversal of the last judgment will not affect the first: As if a judgment be given against *executors*, in an action of *debt*,

<sup>g</sup> 1 Show. 36. *Cruise* on 825.

Fines, 222.

<sup>k</sup> 2 Bac. Abr. 228.

<sup>h</sup> 1 Str. 383.

<sup>l</sup> 1 Str. 188.

<sup>i</sup> 2 Bac. Abr. 227. 1 Ld.

<sup>m</sup> 2 Bac. Abr. 229.

Raym. 255, 6. 2 Ld. Raym.

*debt*, and after a *scire facias*, judgment is given against them, to have execution of their proper goods, and a writ of error is brought upon both judgments; in this case, if the first judgment be good, and the last erroneous, the last judgment only shall be reversed, and the first shall stand <sup>n</sup>.

So if there be several distinct and independent judgments, the reversal of the one shall not affect the other: As in an action of *account*, if judgment be given *quod computet*, and after auditors are assigned, and upon the account judgment is given against the defendant also, with damages and costs, and after a writ of error is brought upon both judgments, and thereupon the last judgment only is found to be erroneous; in this case, the last judgment only shall be reversed, and not the first judgment, but that shall stand in force; for these are two distinct and perfect judgments, the first judgment being *ideo consideratum est quod computet, et defendens in misericordiâ* <sup>o</sup>. So if the judgment consist of several distinct and independent parts, it may be reversed as to one part only; as for costs alone <sup>p</sup>, or damages in *scire facias* <sup>q</sup>, or for damages and costs in a *qui tam* action <sup>r</sup>.

If

<sup>n</sup> 2 Bac. Abr. 229. and see  
2 Str. 1055. Cas. *templ.* Hardw.  
345. S. C.

<sup>p</sup> Lil. Ent. 233. 1 Str. 188.  
<sup>q</sup> 2 Str. 808. 2 Ld. Raym.  
1532. S. C.

<sup>o</sup> 2 Bac. Abr. 228, 9.

<sup>r</sup> 4 Bur. 2018.

If judgment be given against the defendant, and he bring a writ of error, upon which the judgment is reversed, the judgment shall only be *quod judicium reverteretur*; for the writ of error is brought only to be eased and discharged from that judgment. But if judgment be given against the plaintiff, and he bring a writ of error, the judgment shall not only be reversed, if erroneous, but the court shall also give such judgment as the court below should have given; for the writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein an erroneous judgment was given<sup>s</sup>. If judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for the defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count, the court of error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record<sup>t</sup>.

Where a judgment against the plaintiff is reversed, on a writ of error brought in the King's-Bench, that court, having the record before them, may in all cases give such a judgment as the court below should have given, and if necessary, may award a writ of inquiry to assess the damages.

And

<sup>s</sup> 2 Bac. Abr. 230. 1 S. C. 4 Bur. 2156.  
Salk. 262. 401. 4 Mod. 76.      <sup>t</sup> 6 T. R. 200.

And so where a judgment is given against the plaintiff in the King's-Bench, on a *special verdict*, by which the damages are assessed, the Exchequer-chamber or House of Lords may, in case of reversal, give a new and complete judgment, for the plaintiff to recover those damages<sup>u</sup>. But where the damages are not assessed, as when judgment is given on *demurrer*, the Exchequer-chamber or House of Lords, not having the record before them, but only a transcript, cannot give a new and complete judgment, but only an interlocutory judgment *quod recuperet*; and the transcript being remitted, the court of King's-bench will award a writ of inquiry, and give final-judgment<sup>v</sup>.

When the judgment is affirmed, or writ of error nonprossed, the defendant in error is entitled to *costs and damages*, by the 3 *Hen. VII. c. 10. & 19 Hen. VII. c. 20*. By the former of these statutes, reciting that writs of error were often brought for delay, it is enacted, "that if any defendant or tenant, against whom judgment is given, or any other that shall be bound by the said judgment, sue, before execution had<sup>w</sup>, any writ of error to reverse any such judgment, in delay of execution,

<sup>u</sup> 1 Salk. 403. 1 Ld. Raym.<sup>m</sup> S. C.

9, 10. Carth. 319. Skin. 514. <sup>w</sup> Cro. Jac. 636. Gilb. C. P. S. C. 275.

<sup>v</sup> Cro. Jac. 207. Yelv. 75.



“ tion; that then, if the same judgment be affirm-  
 “ ed, or the writ of error be discontinued in de-  
 “ fault of the party, or the plaintiff in error be non-  
 “ suited therein, the person or persons, against  
 “ whom the writ of error is sued, shall recover his  
 “ costs and damages, for his delay and wrongful  
 “ vexation in the same, by discretion of the *jus-*  
 “ *tice* \* before whom the writ of error is sued.”

The latter of the above statutes recites the former, and that it had not been put in force, and enacts, “ that it shall be thenceforth duly put in execu-  
 “ tion.” Upon these statutes it has been holden, that costs and damages are recoverable in error, for the delay of execution, although none were recoverable in the original action<sup>y</sup>: And where an *executor* brought error on a judgment, after a *devastavit*, the court held that he ought to pay costs on affirmance<sup>z</sup>.

On a writ of error returnable in the King’s-Bench, that court, on motion, will order the master to compute *interest* on the sum recovered, by way of damages, from the day of signing final judgment below, down to the time of affirmance,  
 and

\* The word *justice*, in the singular number, is here made use of, instead of the *court*, there being no court of error, consisting of only one judge. Doug. 561. n. 5.

<sup>y</sup> Dyer, 77. Cro. Eliz. 617.

659. 5 Co. 101. S. C. Cro. Car. 145. 1 Str. 262. 2 Str. 1084. but see Cro. Car. 425. 1 Lev. 146. 1 Vent. 38. 166. 4 Mod. 245. Carth. 261. S. C. *semb. contra*.

<sup>z</sup> 2 Str. 977.

and that the same be added to the costs taxed for the plaintiff in the original action<sup>a</sup>. In the Exchequer-chamber, though the court, it seems, are bound to allow double *costs* to the defendant in error, on the affirmance of a judgment after verdict, of the King's-Bench, yet it is entirely a matter in their discretion, whether or not *interest* shall be allowed on such affirmance<sup>b</sup>: And accordingly, the course is said to be for the officer to settle the costs, unless any particular direction be given by the court; and in taxing them, he allows double the money out of pocket or thereabouts, but adds no interest as a matter of course<sup>c</sup>. In an action on an attorney's bill, if judgment for the plaintiff be affirmed in the Exchequer-chamber, that court will not allow interest<sup>d</sup>: and in *debt* on recognisance, against bail in error in the Exchequer-chamber, the bail are not liable to pay interest, between the time of the original judgment and affirmance; though they are liable for interest after affirmance<sup>e</sup>. In the court holden before the Lord Chancellor and treasurer and judges, (under the 31 *Edw. III.*) for examining erroneous judgments in the Exchequer, the practice is to give interest, from the day

<sup>a</sup> Append. Chap. XLIII. § 87. Doug. 752. n. 3. and see 2 Str. 931. 2 Bur. 1096, 7. 1 Blac. Rep. 267, 8. S. C. 2 T. R. 79.

<sup>b</sup> 2 H. Blac. 284.

<sup>c</sup> 2 Bur. 1096.

<sup>d</sup> 2 Bos. & Pul. 219.

<sup>e</sup> 4 Bur. 2127. 2 T. R. 58.

day of signing judgment, to the day of affirming it there; computed according to the current, not according to the strictly legal rate of interest<sup>f</sup>. In the House of Lords, they give sometimes very large, sometimes very small costs, in their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below: And in order to mitigate costs, the plaintiff will sometimes withdraw his errors.

By the 13 *Car.* II. st. 2. c. 2. § 10. if the judgment be affirmed *after verdict*, the plaintiff shall pay to the defendant in error his *double* costs: And, by the 8 & 9 *W.* III. c. 11. § 2. “if at any time  
“after judgment given for the *defendant*, in any  
“action, plaint or suit, in any court of record, the  
“plaintiff or demandant shall sue any writ or writs  
“of error, to annul the said judgment, and the said  
“judgment shall be afterwards affirmed, the writ of  
“error discontinued, or the plaintiff be nonsuit  
“therein, the defendant in error shall have judgment to recover his costs, against the plaintiff or  
“demandant, and have execution for the same,  
“by *capias ad satisfaciendum, fieri facias*, or  
“*elegit*<sup>h</sup>.” But none of the before-mentioned statutes

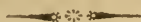
<sup>f</sup> 2 Bur. 1096.

<sup>g</sup> *Id. ibid.*

<sup>h</sup> And see the statute 8 & 9

*W.* III. c. 27. § 3. 2 H. Blac.  
287.

statutes give costs in error, upon the *reversal* of a judgment<sup>i</sup>; and therefore when a judgment is reversed, each party must pay his own costs. A judgment for the plaintiff was reversed on a writ of error in fact, brought by the defendant; and the court held, that the plaintiff was entitled to the costs of the original action, though not to the costs in error<sup>k</sup>.



After affirmance, or *nonpros* for not assigning errors, the defendant in error having taxed his costs, for which purpose he must wait four days exclusive after affirmance in the Exchequer-chamber, may take out *execution* for the sum recovered in the original action, as well as the damages and costs in error, or for these alone, by *fieri facias*<sup>l</sup>, against the goods and chattels of the plaintiff in error; by *elegit*, against his goods and a moiety of his lands; or by *capias ad satisfaciendum*<sup>m</sup>, against his person.

But where the judgment is affirmed in the Exchequer-chamber<sup>n</sup>, or House of Lords<sup>o</sup>, to which a transcript of the record only is removed by the writ of error, it is necessary that the transcript should

<sup>i</sup> 1 Str. 617.

§ 93, &c.

<sup>k</sup> *Per Cur.* H. 41 G. III.

<sup>m</sup> *Id.* § 99.

K. B.

<sup>n</sup> Palm. 186, 7.

<sup>l</sup> Append. Chap. XLIII.

<sup>o</sup> Cowp. 843.

should be *remitted* to the court of King's-Bench, before the execution is issued, or at least before it is returnable <sup>p</sup>. And where a writ of error determines in the Exchequer-chamber, by abatement or discontinuance, the judgment is not again in this court, till there be a *remittitur* entered; for without a *remittitur*, it cannot appear to this court, but that the writ of error is still pending in the Exchequer-chamber<sup>q</sup>; and therefore in such case, it is usual for the party succeeding in the original action to move the court, on an affidavit of the fact, for leave to enter a *remittitur*, and take out execution <sup>r</sup>. So if the plaintiff recover a judgment against two defendants in this court, and one of them bring a writ of error in the Exchequer-chamber, the plaintiff cannot charge the other defendant in execution, till the record be remitted; notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants.

The writ of execution being founded on the record, must issue out of the court of King's-Bench, where the record is <sup>s</sup>; and that as well where the judgment is affirmed on a writ of error *coram nobis*, or from the Common-Pleas or  
an

<sup>p</sup> Append. Chap. XLIII. §  
38. 92.

<sup>r</sup> 1 Salk. 265. 1 Crompt.  
369, 70.

<sup>q</sup> 1 Salk. 261. 319. 1 Ld.  
Raym. 244. S. C.

<sup>s</sup> *Ante*, 912.



an inferior court, returnable in the King's-Bench <sup>t</sup>, as where it is affirmed in the Exchequer-chamber<sup>u</sup>, or house of Lords <sup>v</sup>. This writ should be directed to the sheriff of the county where the venue was laid in the original action; or if it issue into another county, should be made a *testatum*: and it must be returnable according to the nature of the former proceedings; if by *bill*, on a day *certain* at *Westminster*, or if by *original*, on a *general* return-day, *ubicunque*, &c.

If judgment be *reversed*, the party shall be restored to all that he has lost, by occasion of the judgment<sup>w</sup>; and a writ of *restitution* shall be awarded <sup>x</sup>. Where the plaintiff has execution, and the money is levied and paid, and the judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party, we have seen <sup>y</sup>, shall have restitution, without a *scire facias*; for there is a certainty of what was lost: otherwise where it was levied, but not paid; for there must then be a *scire facias*, suggesting the matter of fact, *viz.* the sum levied <sup>z</sup>, &c.

If

<sup>t</sup> Cowp. 843.

§ 102, 3.

<sup>u</sup> Palm. 186, 7.

<sup>y</sup> *Ante*, 936, 7.

<sup>v</sup> Cowp. 843.

<sup>z</sup> 2 Salk. 588. Append.

<sup>w</sup> Cro. Jac. 698.

Chap. XLIII. § 100, 101. Lil.

<sup>x</sup> Append. Chap. XLIII. Ent. 641. 650.

If a man recover damages, and have execution by *fieri facias*, and upon the *fieri facias* the sheriff sell to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself; because the sheriff has sold it, by command of the writ of *fieri facias*<sup>a</sup>. But if a man recover damages in a writ of *covenant* against B, and have an *elegit* of his chattels and a moiety of his lands, and the sheriff upon this writ deliver a lease for years, of the value of 50*l.* to him that recovered, *per rationabile pretium et extantum, habendum* as his own term, in full satisfaction of 50*l.* part of the sum recovered, and after B. reverse the judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term upon this writ, yet here is no sale to a stranger, but a delivery of the term to the party that recovered, by way of extent, without any sale, and therefore the owner shall be restored<sup>b</sup>. And for the same reason, if personal goods were delivered to the party, *per rationabile pretium et extantum*, upon the reversal of the judgment, the owner shall be restored to the goods themselves<sup>c</sup>.

Before

<sup>a</sup> 2 Bac. Abr. 231.

<sup>c</sup> 1 Rol. Abr. 778. 2 Bac.

<sup>b</sup> *Id.* 232. Cro. Jac. 246.

Abr. 232.

Before we conclude, it may be proper to say a few words of the writ of *false-judgment*, on account of the affinity it bears to a writ of *error*.

The writ of *false-judgment* is an *original*-writ, issuing out of Chancery; and lies where an erroneous judgment is given, in a court not of record, in which the suitors are judges<sup>d</sup>. This writ may be sued by any one against whom judgment is given, his heir, executor or administrator; or by any one who has sustained damage, though the other defendants do not join, as they ought to do in error<sup>e</sup>: And if the writ be brought upon a judgment in the sheriff's court, it is in nature of a *recordari*<sup>f</sup>; or if upon a judgment in another court, not of record, it is in nature of an *accedas ad curiam*<sup>g</sup>.

If there be no suitors, by whom the plaint may be certified, there shall not be a writ of false-judgment; as in a copyhold court, in which, upon an erroneous proceeding, the copyholder must sue to the lord by petition<sup>h</sup>. And by the statute 34 *Geo.* III. c. 58. “no execution shall be stayed or delayed, upon or by any writ of false-judgment, “or *supersedeas* thereon, for the reversing of any  
“judg-

<sup>d</sup> F. N. B. 18.

§ 104.

<sup>e</sup> Moor, 854.

<sup>g</sup> F. N. B. 18.

<sup>f</sup> Append. Chap. XLIII.

<sup>h</sup> *Id. ibid.*

“ judgment in any inferior court, within the  
 “ county-palatine of *Lancaster*, where the debt or  
 “ damages are under *ten* pounds, unless the per-  
 “ son or persons in whose name or names such writ  
 “ of false-judgment shall be brought, with two  
 “ sufficient sureties, such as the court wherein the  
 “ judgment is given shall allow of, shall first be  
 “ bound unto the party for whom such judgment  
 “ is given, by recognisance to be acknowledged  
 “ in the same court, in double the sum adjudged  
 “ to be recovered by the former judgment, to  
 “ prosecute the said writ of false-judgment with  
 “ effect; and also to satisfy and pay, (if the said  
 “ judgment be affirmed, or the writ of false-judg-  
 “ ment be not proceeded in,) all and singular the  
 “ debt, damages and costs adjudged, and all costs  
 “ and damages to be awarded for the delaying of  
 “ execution<sup>i</sup>.”

A writ of false-judgment is made out by the cur-  
 sitor; and ought to be served in court, or if the  
 lord refuse to hold his court, a *distringas tenere cu-  
 riam* goes against him<sup>k</sup>: And, except where bail is  
 required, it is a *supersedeas* of execution, from the  
 time of service<sup>l</sup>. The sheriff is not bound to pay  
 attention

<sup>i</sup> This provision seems to 1009. (t). 1075, 6.  
 have been taken from the sta-  
 tute 19 Geo. III. c. 70. *Ante*,

<sup>k</sup> 6 Hen. VII. 16. a.

<sup>l</sup> *Id.* 15. b.

attention to this writ, without being paid for the return of it <sup>m</sup>.

Upon the return of the writ <sup>n</sup>, when the whole proceedings are certified, and not before, the plaintiff shall assign his errors<sup>o</sup>: And if the defendant have day given by the roll, the plaintiff may assign errors<sup>p</sup>, without a *scire facias* against him <sup>q</sup>. To compel a joinder in error, the plaintiff may have a *scire facias ad audiendum errores* <sup>r</sup>; or he may serve a rule, as on a writ of error <sup>s</sup>: And upon two *scire facias's ad audiendum errores* awarded, and *nihils* returned, or *scire feci* and default made, the judgment shall be reversed <sup>t</sup>.

When the parties are once in court, the subsequent proceedings in false-judgment are the same as in error <sup>u</sup>: And if a writ of false-judgment abate, or the plaintiff therein be nonsuited, the defendant shall have a *scire facias quare executionem non* <sup>v</sup>. On a writ of false-judgment, no *costs* are in general recoverable; and it is therefore but seldom advisable to have recourse to this remedy.

<sup>m</sup> Barnes, 199.

<sup>n</sup> Append. Chap. XLIII.  
§ 105, 6.

<sup>o</sup> For the forms of an assignment of false-judgment and joinder, see Append. Chap. XLIII. § 107, 8.

<sup>p</sup> F. N. B. 18.

<sup>q</sup> 2 Crompt. 406.

<sup>r</sup> F. N. B. 18.

<sup>s</sup> 2 Crompt. 406.

<sup>t</sup> *Id. ibid.*

<sup>u</sup> *Id. ibid.*

<sup>v</sup> F. N. B. 18.





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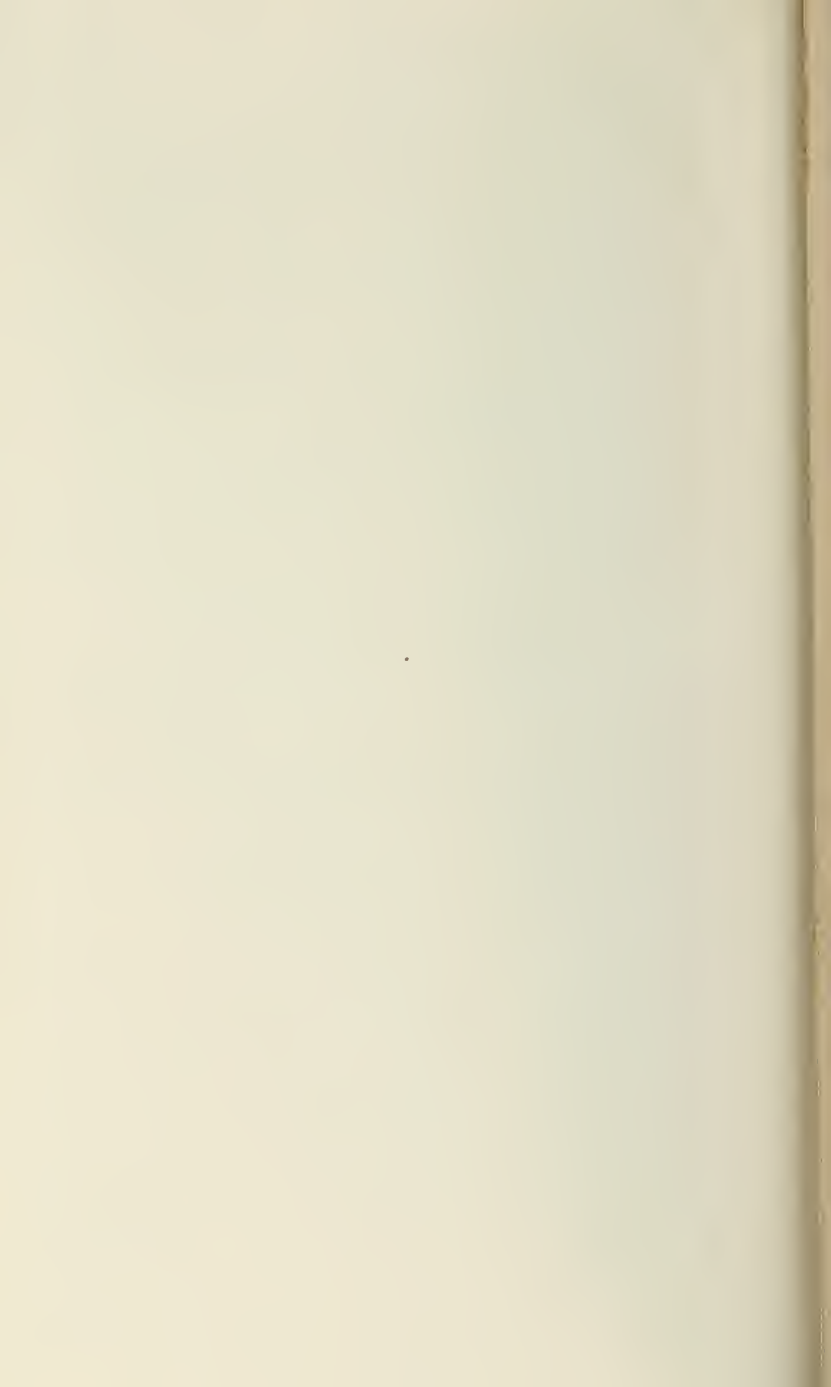
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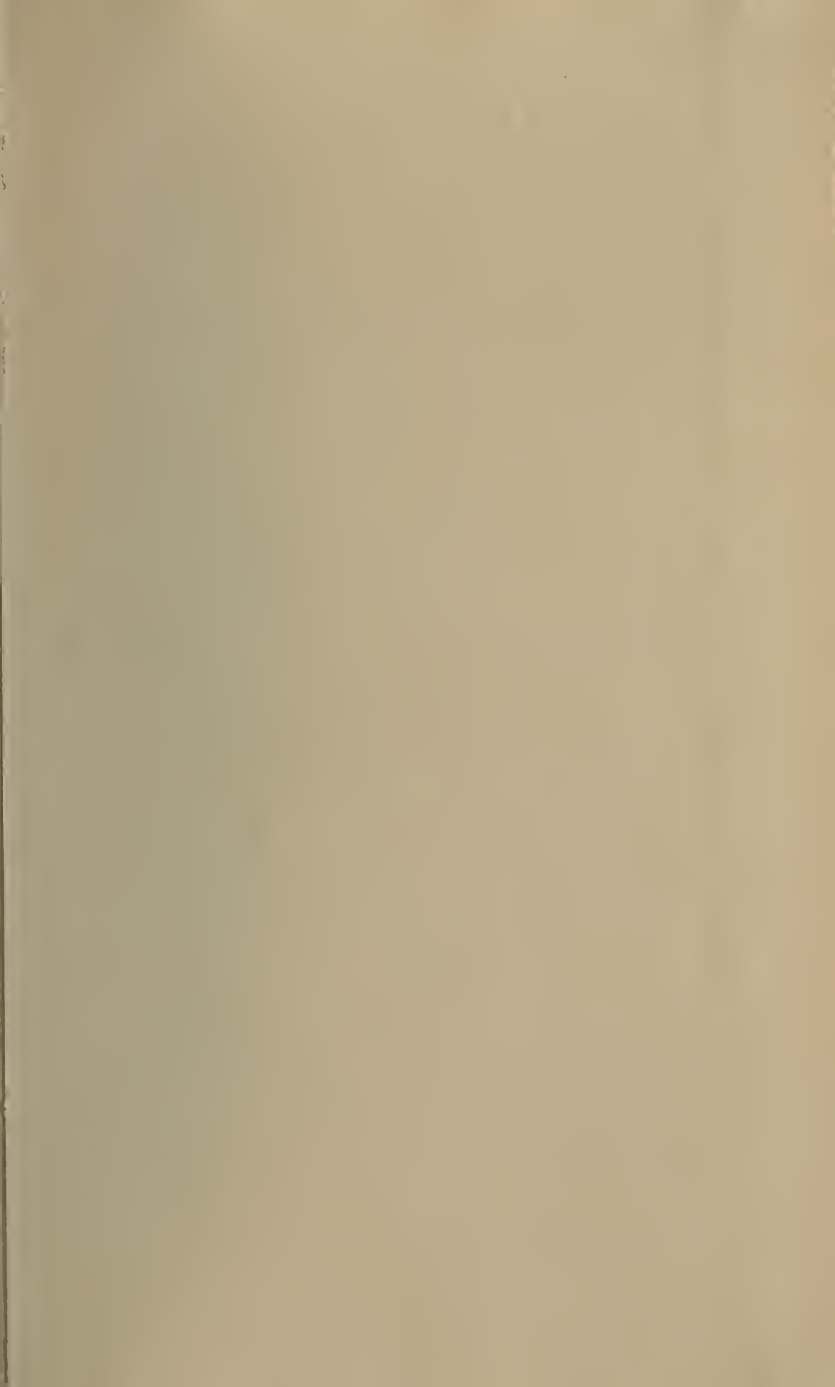
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